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New Commentaries

ON THE

LAWS OF ENGLAND

(PARTLY FOUNDED ON BLACKSTONE).

BY

HIS HONOUR JUDGE STEPHEN.

*"For hoping well to deliver myself from mistaking, by the order and perspicuous
"expressing of that I do propound, I am otherwise zealous and affectionate to recede as
"little from antiquity, either in terms or opinions, as may stand with truth, and the
"proficiency of knowledge."—Lord Bac. Adv. of Learning.*

The Thirteenth Edition

BY

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Of the Middle Temple, Esq.; Barrister-at-Law.

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NEW COMMENTARIES
ON
THE LAWS OF ENGLAND.

BOOK IV.

OF PUBLIC RIGHTS—(*continued*)

PART III.

*OF THE SOCIAL ECONOMY OF THE
REALM.*

WE have now, in our examination of Public Rights, treated successively of the *Civil Government* and of the *Church*; but there are certain other institutions which belong equally to the Division of Public Rights,—and which we may, as relating immediately to the community at large (or to large classes of it), without impropriety (though perhaps without sufficient authority), include under the general law of *Social Economy*,—and to the consideration of these we will now proceed.

CHAPTER I.—SECTION I.

OF CORPORATIONS IN GENERAL,—AND OF LIMITED COMPANIES.

CORPORATIONS are artificial persons, recognized or constituted by the law, and endowed by it with the capacity of perpetual succession (*a*) ; and of corporations, there is a great variety, subsisting for the advancement of religion, of learning, and of commerce.

The original invention of corporations is commonly attributed to the antient Romans ; and however that may be, they were much developed by the Roman civil law, and were recognized also by the canon law, from whence our spiritual corporations are derived.

Corporations are, with us, either *aggregate* or *sole*,—corporations *aggregate* consisting of many persons united together into one society,—of which kind are the mayor and commonalty of a city, the dean and chapter of a cathedral church, and the like ; and corporations *sole* consisting of one person only and his successors,—of which kind are the sovereign, all bishops, all rectors and vicars (*b*), all vicars choral (*c*), and the like. And as regards a rector or vicar in particular, the endowments of the living are vested in him as for a freehold-estate ; but this freehold, if vested in him in his natural capacity, would on his death have descended to his heirs ; who might or

(*a*) *Vide sup.* vol. i. pp. 261,
331.

(*b*) Co. Litt. 43.

(*c*) *Greaves v. Parfitt*, 7 C. B.
(N.S.) 838.

might not have been compellable to convey it to the next incumbent ; and at the best, the conveyance would have been attended with expense and trouble, to be repeated again and again on every change of incumbent. The law, therefore, has wisely ordained, that the parson, *quatenus* parson, shall never die, any more than the sovereign—by making him and his successors a corporation. By which means all the rights of the parsonage are preserved entire to the successor ; for the present incumbent, and his predecessor who lived eight centuries ago, are in law one and the same person : and what was given to the one, was given to the other also.

Again, corporations are either *ecclesiastical* or *lay*,—ecclesiastical (otherwise called spiritual) corporations being where the members are entirely spiritual persons, such as bishops, parsons, and the like (which are corporations sole), or such as deans and chapters (which are corporations aggregate) ; and lay (otherwise called temporal) corporations being either *civil* or *eleemosynary*, corporations which are erected for temporal purposes (mostly of a commercial character) being called *civil*, and those which have been created for the perpetual distribution of alms being called *eleemosynary*. And *civil* corporations are, *e.g.*, the trading companies (or guilds) of London and other towns established for the regulation of manufactures and commerce), and include the Royal College of Physicians, the Royal College of Surgeons of England, the Royal Society (*d*), and the Society of Antiquaries. The Universities of Oxford and Cambridge are also *civil* corporations (*e*),—it being clear that they are not *ecclesiastical*, but *lay*

(*d*) *Beaumont v. Oliveira*, Law Rep., 4 Ch. App. 309.

(*e*) *Rex v. Cambridge (Vice-Chancellor)*, 3 Burr. 1656. Under the 17 & 18 Vict. c. 81, the

government of the university of Oxford is mainly vested in the *Hebdomadal Council*, a body consisting of twenty-two persons, of whom four are *ex officio* members

corporations, being composed of more laymen than clergy; and they are not *eleemosynary* foundations, though stipends therein are annexed to particular professors,—for such stipends are rewards *pro opere et labore*, precisely as in the case of the salaried officials of ordinary civil corporations. And *eleemosynary* corporations are, *e.g.*, hospitals for the maintenance of the poor, sick, and impotent; also, all colleges, both in our universities and out of them, such colleges being founded for two purposes, that is to say, (1.) For the promotion of piety and learning; and (2.) For affording assistance to the members, in order to enable them to prosecute their studies with greater ease and assiduity,—all which *eleemosynary* corporations, though in some things partaking of the nature of ecclesiastical bodies, are lay and not ecclesiastical, even though composed of ecclesiastical persons (*f*); and accordingly, they are not subject to the jurisdiction of the Ecclesiastical Courts, or to the visitation of the ordinary (or diocesan) in his spiritual character (*g*).

Having thus enumerated the varieties of corporations, we will next proceed to consider—I. How corporations are created; II. Their powers, capacities, and incapacities; III. How they are visited; IV. How they are dissolved.

I. [Corporations were created under the civil law by the mere *voluntary* association of the members, the object of the association not being contrary to law,—for then the

(the chancellor, the vice-chancellor, and the two proctors), and the other eighteen are elected, viz., six from the heads of houses, six from the professors, and six from masters of arts of not less than five years' standing; and under the 19 & 20 Vict. c. 88, the government of the university of Cambridge is vested in the *Council of the Senate*, consisting of eighteen

persons, of whom two are *ex officio* members (the chancellor and the vice-chancellor), and the other sixteen are elected, viz., four heads of colleges, four professors, and eight other members of the senate.

(*f*) 1 Bl. Com. 470; *Philips v. Bury*, 1 Ld. Raym. 6.

(*g*) Christian's Blackstone, vol. i. p. 472 (note).

[corporation would have been *illicitum collegium* (*h*); but in England, and according to the English law, the sovereign's consent is absolutely necessary to the erection of any corporation; which consent of the crown may be either *implied* or *express*,—being implied, in the case of corporations which exist by force of the *common law* or by *prescription* (*i*), and being *express*, when given either by (subsisting) Act of Parliament or by (subsisting) charter,—the authority of Parliament (as regards the creation of corporations) having been usually exercised only in recognition of (or in aid of) the royal prerogative (*k*). Thus, the charter of the Royal College of Physicians, (of the tenth year of Henry the Eighth,) was confirmed by the 14 & 15 Hen. VIII. c. 5 (*l*); and the corporation of the Bank of England was created by the crown, under the 5 & 6 Will. & Mary, c. 20; and municipal corporations are created by charter of the sovereign under the provisions,—formerly of the 5 & 6 Will IV. c. 76, as amended by the 40 & 41 Vict. c. 69], and now of the 45 & 46 Vict. c. 50, ss. 210—218, as amended by the 56 & 57 Vict. c. 9. But the power of parliament has latterly been most frequently invoked for the incorporation of public and other trading companies,—although the crown still may (and not unfrequently does), by its own charter or letters patent (subject always to the relevant Acts), erect a corporation. And when such companies are erected by special Act of Parliament, the special Act usually (for the sake of brevity) incorporates one or more of the relevant general

(*h*) Ff. 47, 22, 1.

(*i*) 2 Inst. 330.

(*k*) See 1 Vict. c. 73, amended by the 47 & 48 Vict. c. 56 (“An Act to declare the Law relating to the Incorporation of Chartered Companies”). And by the College Charter Act, 1871 (34 & 35 Vict. c. 63), the crown's charter for the

foundation of any new college or university is to be laid before parliament for a period of not less than thirty days before the report of the Privy Council thereon is submitted to her Majesty.

(*l*) *Dr. Bonham's Case*, 8 Rep. 107.

Acts noted below (*m*),—the special Act defining, of course, the objects for which the company is incorporated, conferring special powers on the company, and in general limiting a time within which these powers are to be exercised; and the special Act may also impose such other restrictions (as to the deposit of money, by way of securing the due exercise of the powers, or otherwise) as the nature of the case may render expedient (*n*).

[The creation by the crown of a body corporate may be performed by the words *creamus*, *erigimus*, *fundamus*, *incorporamus*, or the like; nay, it has been held, that if the crown grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly (*o*), this is also sufficient to incorporate and establish them for ever (*p*).

(*m*) The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); The Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16); The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17); The Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27); and the Towns Improvement Clauses Act, 1847, (10 & 11 Vict. c. 34); some of which Acts have also since been variously amended, namely, The Companies Clauses Consolidation Act, 1845, by 52 & 53 Vict. c. 37, repealing the 51 & 52 Vict. c. 48; The Lands Clauses Consolidation Act, 1845, by 23 & 24 Vict. c. 100, 32 & 33 Vict. c. 18; 46 & 47 Vict. c. 15, and 58 & 59 Vict. c. 11; and The

Waterworks Clauses Act, 1847, by 26 & 27 Vict. c. 93. See also The Telegraphs Act, 1863 (26 & 27 Vict. c. 112), amended by 29 & 30 Vict. c. 3; The Companies Clauses Act, 1863 (26 & 27 Vict. c. 118); The Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120); The Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121); and The Companies Clauses Act, 1869 (32 & 33 Vict. c. 48).

(*n*) 9 Vict. c. 20; 55 & 56 Vict. c. 27.

(*o*) *Gild* signified among the Saxons a fraternity; and such guilds as were commercial gradually took the shape of our present municipal corporations, with a place of meeting called the *Guild-hall*.

(*p*) 10 Rep. 30; 1 Roll. Ab. 513.

[The crown, (it is said,) may grant to a subject the power of erecting corporations, though the contrary was formerly held (*q*). That is, the crown may permit the subject to name the persons and powers of the corporation at his pleasure; but, in such a case, it is really the sovereign that erects, and the subject is but the instrument,—for, though none but the crown can make a corporation, yet *qui facit per alium, facit per se*; and in this manner, the Chancellor of the University of Oxford has power by charter to erect corporations,—and he has exercised this power, by the erection of matriculated companies of tradesmen subservient to the students.

When a corporation is erected, a name is always given to it, or (supposing none to be actually given) a name will attach to it by implication (*r*); and by that name alone, it must sue and be sued and do all legal acts,—although a minute variation therein is not material; and the name is capable of being changed, by competent authority (*s*), without affecting the identity or capacity of the corporation in other respects (*t*). But some name is of the very being of its constitution (*u*),—for the name of incorporation, says Sir E. Coke, is as a proper name, or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as a godfather, and by that same name, the king baptizes the corporation (*x*).]

II. A corporation as such has divers powers and rights, capacities and incapacities, the greater part of which are

(*q*) Bro. Ab. tit. Prerog. 53; Vin. Prerog. 88, pl. 76; Year Book, 2 Hen. 7, 13; *R. v. Coopers Company*, 7 T. R. 548.

(*r*) 1 Salk. 191; 1 Bl. Com. 475.

(*s*) See 25 & 26 Vict. c. 89 (Companies Act, 1862), s. 13.

(*t*) 4 Rep. 87; and 25 & 26 Vict. c. 89, s. 13.

(*u*) Gilb. Hist. C. P. 182.

(*x*) 10 Rep. 28.

applicable only to corporations *aggregate*,—though some belong to either class. Thus,—(1.) A corporation aggregate may sue or be sued, implead or be impleaded, grant or receive, and (in short) perform any act, by the corporate name, as a natural person may by his individual name. (2.) And a corporation is amenable to such judgments as shall be given against it in any action,—but in respect only of the corporate property, and not so as to fix the corporators with individual liability (*y*). (3.) [The acts of a corporation aggregate must, in general, be under its common seal,—for, being an invisible body, it cannot manifest its intentions by any personal act or oral discourse; and therefore it acts and speaks only by its common seal,—the affixing of the seal, and that only, uniting the several assents of the individual corporators, and making one joint assent of the whole (*z*).] But there are cases in which convenience has introduced exceptions to this rule,—*e.g.*, a corporation may (through its head) retain a solicitor (*a*), or authorize a bailiff to distrain,—neither of which acts need be authenticated under the common seal (*b*); and an action will lie against a corporation on an *executed* contract of which it has received the benefit, although such contract was not under the common seal (*c*). (4.) [A corporation aggregate may make bye-laws or private statutes for its own better government; and these, unless contrary to the laws of

(*y*) The maxim of the civil law is the same: “*Si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent.*” Ff. 3, 4, 7.

(*z*) Dav. 44, 48; *Arnold v. Mayor of Poole*, 4 Man. & Gr. 860; *Young v. Corporation of Leamington*, 8 App. Ca. 517; *Governor and Company of Copper Mines v. Fox and Others*, 16 Q. B. 229;

Diggle v. London and Blackwall Railway Company, 5 Exch. 442.

(*a*) *Mallam v. Guardians of Oxford*, 2 Ell. & Ell. pp. 192, 238.

(*b*) Lutw. 1497; 1 Salk. 191.

(*c*) *Smart v. Guardians of the West Ham Union*, 10 Exch. 867; *South of Ireland Colliery Company v. Waddle*, Law Rep., 4 C. P. 617.

[the land (*d*), or contrary to or inconsistent with their charter (*e*), or manifestly unreasonable (*f*), are binding on the members,—for as natural reason is given to the natural body for the governing of it, so bye-laws or statutes are a sort of political (or corporate) reason to govern the body corporate ;] and this right (or power) is so much of course, that where a charter of incorporation gave (to a sub-committee) power to make bye-laws as to specified matters, the body at large was held nevertheless to have the power to legislate with regard to all matters not so specified (*g*) ; and every corporation has the right to alter or repeal the bye-laws which itself has made (*h*). (5.) Among the incidents of a corporation aggregate may also be classed the *disabilities* to which it is subject,—[and which disabilities are (or comprise) the following :—The corporation must always appear in court by attorney (*i*) ; it cannot be executor or administrator, nor, indeed, perform any personal duties ; it cannot be seised of lands to the use of another (*k*) ;] and it can be guilty of no crime in its corporate capacity (*l*),—although, in certain cases, it is liable, *e.g.*, to an indictment

(*d*) *R. v. Coopers Company*, 7 T. R. 543 ; *Ipswich Taylors' Case*, 11 Rep. 53.

(*e*) *Rex v. Cutbush*, 4 Burr. 2204 ; *Hoblyn v. Rose*, 2 Bro. P. C. 329 ; *R. v. Cambridge*, 2 Selw. N. P. 1144.

(*f*) *Piper v. Chappell*, 14 Mee. & W. 624 ; *Queen (The) v. Powell*, 3 Ell. & Bl. 377.

(*g*) *R. v. Westwood*, 7 Bing. 1 ; S. C., 4 B. & Cress. 781 ; 4 Bligh, (N.S.) 213.

(*h*) *R. v. Ashwell*, 12 East, 22.

(*i*) Hence a corporation, when required to give discovery of documents, does so by some officer of

the corporation in that behalf appointed by the Court (Order xxxi. r. 5 ; *Berkeley v. Standard Discount Co.*, 13 Ch. Div. 97 ; *Mayor of Swansea v. Quirk*, 5 C. P. D. 106) ; and a corporation obtains such discovery on the affidavit of its solicitor,—*scil.*, where an affidavit is required (*Kingsford v. Great Western Railway Company* 16 C. B. (N.S.) 761).

(*k*) Bro. Abr. tit. Feoffment al Uses, 40 ; Bac. on Uses, 347.

(*l*) 1 Bl. Com. 476 ; *Stevens v. Midland Railway Company*, 10 Exch. 352.

for allowing a bridge or a highway (the repair of which belongs to it by law) to fall into decay; and it can be sued for a libel (*m*). [Moreover, aggregate corporations which have a head,—*e.g.*, a dean and chapter,—cannot (during the vacancy of the headship) do any act, save to appoint a new head; nor can they, while without a head, accept a grant (*n*). But there may, of course, be a corporation aggregate without a head,—*e.g.*, the collegiate church of Southwell in Nottinghamshire, which consists only of canons (*o*); and the governors of the Charter-house, London, who have no president (or superior), but are all of equal authority. (6.) Another incident of corporations aggregate is, that the act of the major part is esteemed the act of the whole,—for although, by the civil law, the major part must, at the least, have consisted of two-thirds of the whole (*p*), yet, with us, *any* majority is sufficient to determine the act of the whole body (*q*). (7.) It is also incident to corporations aggregate to have the power of electing their own members; and when this power is not specially assigned by the charter to a committee of the members, it belongs to the major part of the corporation duly assembled for the purpose; and it may, in general, be delegated to a select body of the corporators (*r*). Also, (8.) Corporations aggregate may take *goods and chattels* for the benefit of themselves and their successors,—just as natural persons may for themselves their executors and administrators; but a sole corporation cannot take goods in his corporate capacity,—because such moveable

(*m*) *Whitfield v. The South-Eastern Railway Company*, 1 Ell. B. & Ell. 115; *Green v. The London Omnibus Company*, 7 C. B. (N.S.) 290. And (as to a malicious prosecution) see *Edwards v. Midland Railway Company*, 6 Q. B. D. 287; *Cornford v. Carlton Bank*, [1899] 1 Q. B. 392.

(*n*) Co. Litt. 263, 264.

(*o*) 3 & 4 Vict. c. 113; ss. 18, 36, 41; 4 & 5 Vict. c. 39, s. 12.

(*p*) Ff. 3, 4, 3.

(*q*) *Oldknow v. Wainwright*, 2 Burr. 1017; 33 Hen. 8, c. 27.

(*r*) *Rex v. Spencer*, 3 Burr. 1827.

[property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and the executor (s) ; and a lease for years granted to, *e.g.*, a bishop and his successors, would go to the executors (and not to the successors) of the bishop (t). Yet if a sole corporation be the representative of a number of persons,—*e.g.*, the master of a hospital, or the dean of some antient cathedral, he may take goods in his corporate capacity equally as a corporation aggregate may do ; and a bond to the master or dean, and his successors, is good in law (u).]

* But as regards *land* (and other real property), corporations, whether aggregate or sole, may purchase and hold land to them and their successors, as natural persons may hold to them and their heirs (x),—though their power of holding is subject to the provisions of the statutes of mortmain (y).

The incidents (which have been referred to) of bodies corporate do not attach to bodies unincorporate ; and, *e.g.*, the inhabitants of a particular parish are not capable (without being incorporated) of holding lands to them and their successors,—though they are capable of receiving a general grant of incorporation, which would enable them to hold such an inheritance (z), and there are many parishes holding land, who cannot *show* any incorporation of the parishioners (a). And though a voluntary society of individuals should unite together by mutual agreement

(s) Co. Litt. 46.

(t) *Ibid.*

(u) Dyer, 48 ; *Byrd v. Wilford*, Cro. Eliz. 464.

(x) *The Case of Sutton's Hospital*, 10 Rep. 30.

(y) *Vide sup.* vol. i. pp. 261, 316, 331.

(z) *Ashby v. White*, Lord Ráym. 951 ; S. C., 3 Salk. 18 ; 12 Rep. 121.

(a) *Att.-Gen. v. Webster*, Law Rep., 20 Eq. Ca. 483 ; *Ex parte Vaughan*, Law Rep., 2 Q. B. 114 ; *In re Campden Charities*, 18 Ch. Div. 310 ; 59 Geo. 3, c. 12, ss. 12, 17, 24, 25 ; 5 & 6 Will. 4, c. 69, s. 5 ; 5 & 6 Vict. c. 18 ; 22 Vict. c. 27, s. 4 ; 39 & 40 Vict. c. 62 ; 45 & 46 Vict. c. 15.

for common purposes, should provide a common stock by subscription, and should subject themselves to laws of their own creation for the government of their society,—yet all this will not entitle them to the privilege of suing or being sued in their social capacity, or protect them from individual liability (*b*) ; and indeed, for any persons to assume to themselves the character of a corporation, and to attempt to act and to hold themselves out as such without a charter,—is in the nature of a criminal offence at the common law, being an invasion of the royal prerogative (*c*). To remedy which inconveniences, Parliament has from time to time interposed with divers provisions and expedients. For, firstly, by the 7 Will. IV. & 1 Vict. c. 73 (amended by the 47 & 48 Vict. c. 56), her Majesty was empowered, by *letters-patent*, to grant to any company or body of persons, associated for any trading or other purposes whatever, any privileges which (according to the common law) it would have been competent to the crown to grant to any such company by charter of incorporation — and this, without incorporating such persons : And, secondly, there were divers Acts passed for the formation of *Joint Stock Companies* : And, Lastly, there have been passed the Companies Acts 1862 to 1898, of which the principal are the following :—The 25 & 26 Vict. c. 89, (“The Companies Act, 1862,”)—the 30 & 31 Vict. c. 131, (“The Companies Act, 1867,”)—and the 53 & 54 Vict. cc. 62 and 63, (“The Companies, Memorandum of Association, Act, 1890,” and “The Companies, Winding-up, Act, 1890,”)—in which statutes most of the existing provisions on this subject will be found,—some few of these provisions having been amended in certain particulars by the 33 & 34 Vict. c. 104, the 40 & 41 Vict.

(*b*) *Attwood v. Small*, 7 B. & C. 390 ; *Todd v. Emly*, 8 Mee. & W. 505,

(*c*) *Duvergier v. Fellowes*, 5 Bing. 248 ; 10 B. & C. 826.

c. 26, the 42 & 43 Vict. c. 76, the 43 Vict. c. 19, the 53 & 54 Vict. c. 64, the 56 & 57 Vict. c. 58, and the 61 & 62 Vict. c. 26 (*d*).

And under the Companies Acts, 1862 to 1898, any *seven* (or more) persons associated for any lawful purpose, may (by subscribing their names to a Memorandum of Association (*e*), and by otherwise complying with the requisitions of the Acts in respect of registration) form themselves into an incorporated company, with or without limited liability; and the Memorandum of Association *may*, in the case of a company “limited by shares,” and *must*, in the case of a company “limited by guarantee,” or “unlimited,” be accompanied (when registered) by *Articles of Association*, signed by the subscribers to the Memorandum of Association, and prescribing such regulations for the company as they deem expedient (*f*). And no company or association, consisting of more than *twenty* persons, can be formed for the purpose of carrying on any business (that has for its object the acquisition of *gain* to the association or to the individual members thereof), *unless* it is registered under the Acts (*g*),—this provision, of course, not extending to any company or association formed in pursuance of some other Act or of

(*d*) See also the 46 & 47 Vict. c. 30 (providing for English companies establishing branch registers in the colonies); the 49 Vict. c. 23 (containing certain provisions applicable to the winding up of companies whose registered office is in Scotland); and the 51 & 52 Vict. c. 62, and 60 & 61 Vict. c. 19 (and, as to companies within the Stannaries, the 50 & 51 Vict. c. 43), providing for the payment of wages and salaries in priority upon a winding up, these last-

mentioned provisions being in lieu of (and, in some respects, in extension of) the like provisions contained in the repealed Act 46 & 47 Vict. c. 28.

(*e*) 25 & 26 Vict. c. 89, s. 6.

(*f*) Sect. 14.

(*g*) 25 & 26 Vict. c. 89, s. 4; *Sykes v. Beadon*, 11 Ch. Div. 170; *Smith v. Anderson*, 15 Ch. Div. 247; and *In re Siddall*, 29 Ch. D. 1.

letters-patent, and not extending to any mining company within and subject to the jurisdiction of the Stannaries.

Upon due registration, the Registrar of Joint Stock Companies—an officer appointed by and acting under the superintendence of the Board of Trade (*h*),—is to certify, under his hand, that the company is incorporated ; and in the case of a “limited” company, that it is “limited” (*i*) ; and thereupon the members become a body corporate, by the name contained in the memorandum of association, and capable of exercising all the functions of an incorporated company, and having perpetual succession and a common seal,—with power to hold lands (*k*) ; and with power also for each member to transfer his interest without the consent of the rest (*l*),—and the certificate of incorporation is conclusive evidence, that all the requisitions as to registration have been duly complied with (*m*).

A company which has been incorporated in this manner is managed by a body of directors appointed by the members ; and the capital or joint stock of the company is the measure of its corporate liability. And here we will observe, that the amount of such capital is to be

(*h*) 25 & 26 Vict. c. 89, s. 174.

(*i*) As the general rule, the word “limited” must be used by any company registering itself as one with limited liability. An exception, however, is made by 30 & 31 Vict. c. 131, s. 23. in favour of any limited company formed to promote “commerce, art, science, religion, or any other useful object,” and not for individual gain, and licensed by the Board of Trade to be registered without the addition of the word “limited” to its name.

(*k*) 25 & 26 Vict. c. 89, s. 18.

But no company, formed for the purpose of promoting *art, science, religion, charity*, or any other like object (not involving the acquisition of gain by the company, or by the individual members thereof), shall, without the written licence of the Board of Trade, hold more than two acres of land. (Sect. 21.)

(*l*) 25 & 26 Vict. c. 89, ss. 22—24 ; 30 & 31 Vict. c. 131, s. 26.

(*m*) 25 & 26 Vict. c. 89, ss. 17, 18.

specified in the original memorandum of association of the company ; but by the 30 & 31 Vict. c. 131, and 40 & 41 Vict. c. 26, a limited company may, under certain restrictions, (1) *reduce its capital*, or cancel any capital which shall have been lost, or which shall consist of unissued shares ; and may also (2) *divide* its capital into shares of a smaller amount than was fixed by its original memorandum of association ; and by the 42 & 43 Vict. c. 76, s. 3, an unlimited company, on registering (if it should choose to register) as a limited company, may increase its capital ; and by the 43 Vict. c. 19, a company may (out of its accumulated profits) return to the members portion of the paid-up capital, correspondingly increasing, in such case, the amount of its unpaid capital.

The liability of the individual members of the company is (in effect) limited by the amount of the unpaid capital owned by them respectively ; and as to such individual limited liability, the rule is (*n*),—that, in the event of the company being wound up, every present and past member thereof shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges, and expenses of its winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributors amongst themselves,—but with certain qualifications, and (amongst others) the following : 1. That no past member shall be liable, if he has ceased to be a member for one year or upwards, prior to the commencement of the winding-up (*o*) ;—2. That no past member shall be liable, in respect of any debt or liability of the company contracted after he ceased to be a member ;—3. That no past member shall be liable, unless it appears to the court before which the winding-up takes place, that the existing

(*n*) 25 & 26 Vict. c. 89, s. 38 ;
and see ss. 7—10.

(*o*) *Barned's Banking Company*,
Law Rep., 3 Ch. App. 161.

members are unable to satisfy the contributions required to be made by them ;—and, 4. That, in the case of a company *limited by shares*, no contributions shall be required from any member, exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member (*p*).

It results, therefore, that in the case of a “limited” company (*q*), the members are made liable to the amount (if any) unpaid on the shares respectively held or once held by them,—while, in the case of an “unlimited” company, the liability of each member thereof remains unlimited ; but with reference to the liability of the *directors* as distinct from the ordinary members, it has been provided, by the 30 & 31 Vict. c. 131, s. 4, that the memorandum of association of a “limited” company, either as originally framed or as subsequently altered by special resolution, may provide, that the liability of the directors, managers, or managing director thereof, shall be *unlimited*,—in which case, each of the directors or managers shall (subject to certain restrictions specified in the Act) (*r*) be liable to contribute (in the event of a winding-up) as if he were a member of an unlimited company ; and with regard to banking companies which have a note-issue, it has been provided, by the 42 & 43 Vict. c. 76, s. 6, that (though they register with “limited” liability) the members shall, *to the extent of the note-issue*, remain liable as ordinary partners would be,—that is, to an unlimited extent.

(*p*) *Cleland's Case*, Law Rep., 14 Eq. Ca. 387 ; *In re British Farmers' Pure Linseed Cake Co.*, 7 Ch. D. 533.

(*q*) The text refers only to companies “limited” *by shares* ; but there may also be companies “limited” *by guarantee*,—in which

latter case, the liability of each member is co-extensive with the amount he has undertaken, *in the event of the company being wound up*, to contribute (25 & 26 Vict. c. 89, ss. 9, 38).

(*r*) 30 & 31 Vict. c. 131, ss. 5, 8.

And here we will observe, that the objects for which the company is established, require to be stated in the original memorandum of association ; and, usually, these objects may not be altered ; but, by the 53 & 54 Vict. c. 62, the company may, by special resolution and with the sanction of the court, modify its objects in certain particulars, calculated for the more advantageous conduct of the business of the company, or for its more convenient and economical management (sects. 1, 2).

And regarding the winding-up of a company thus established, any person to whom the company is indebted in a sum exceeding 50*l.*, then due, and who has served on the company (by leaving the same at their registered office) a demand under his hand requiring the company to pay the debt, may (if he obtains no satisfaction within three weeks) take proceedings to have the company wound up (*s*) ; and such a course may also be taken by any creditor, if execution (issued on a judgment against the company obtained in his favour) is returned unsatisfied (*t*). The application for the winding-up order,—that is to say, for a *compulsory* winding-up by order of the court,—is to be made by petition in the Chancery division,—or (in certain cases) in the County Court (*u*) ; and the winding-up is deemed, in general, to commence with the presentation of the petition ; and immediately on the winding-up order being made, the official receiver becomes the provisional liquidator of the company (*x*) ; and he may become or continue the permanent liquidator ; or the court will appoint some third party to be the liquidator,—which third party was (and is) required to be a man of integrity and special aptitude, and he used to be called the “*official*

(*s*) 25 & 26 Vict. c. 89, ss. 79, 80.

(*u*) Sects. 81, 82 ; 53 & 54 Vict. c. 63, s. 1.

(*t*) *Ibid*

(*x*) 53 & 54 Vict. c. 63, s. 4 ; 30 & 31 Vict. c. 131, s. 41.

liquidator” (*y*). The liquidator takes into his custody all the property, effects, and things in action of the company ; and deals with them by sale or otherwise as the court shall sanction ; and generally does all such other things as may be necessary for winding up the affairs of the company and for distributing its assets (*z*). And the court, in due course, proceeds to settle a list of *contributories*—or persons liable as members to contribute to the assets of the company (*a*),—and to make *calls* on all or any of the contributories (to the extent of their liability), for payment of the sums necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves (*b*) ; and, as soon as the affairs of the company have been completely wound up, the court makes an order that the company be dissolved (*c*).

To this general view of the subject of winding-up, however, it must be added, that, whenever a company is unable to pay its debts (and in some other cases also), a petition for winding-up may be presented by the company itself, or by a contributory or contributories, as well as by a creditor or creditors, or by all or any of such parties in conjunction (*d*) ; but as regards the right of a contributory to present the petition, it is provided, by the 30 & 31 Vict. c. 131, s. 40, that such right shall be restricted to cases where the members of the company have become less in number than seven ; or where such contributory is an original allottee, or else has held his shares for a certain period, or has become entitled to the shares through the death of a former holder.

(*y*) 25 & 26 Vict. c. 89, s. 92.

(*z*) Sects. 94, 95.

(*a*) Sects. 38, 74, 98.

(*b*) 25 & 26 Vict. c. 89, s. 102.

(*c*) Sect. 111.

(*d*) Sects. 79—82.

There may also be a *voluntary* winding-up ; and that is, where the company passes the prescribed resolution (*e*) for the purpose (*f*),—of which the effect is, that a liquidator is appointed by the company itself ; and the liquidator so appointed settles a list of the contributories, makes calls, and exercises all the powers given (as above stated) to the liquidator in a winding-up by the court (*g*) ; and a voluntary winding-up is deemed to commence at the time of passing the prescribed resolution (*h*).

The court also may, in lieu of making an order for the *compulsory* winding-up of the company, order that it be wound up *under the supervision of the court* ; and such order is called a “supervision order” ; but a compulsory order is, in general, preferable,—for many reasons, and more especially where matters affecting the directors and officers of the company require to be investigated,—a proceeding which used to take place under sect. 165 of the Companies Act, 1862, but which now takes place under sect. 10 of the Companies Act, 1890 ; or when proceedings are to be taken against promoters and others,—either under the 30 & 31 Vict. c. 131, s. 38, or under the 53 & 54 Vict. c. 64,—on the ground of any alleged fraud contained in any prospectus or notice.

III. We are next to inquire, how corporations may be *visited*,—[for corporations, being composed of individuals who are subject to human frailties, are themselves likewise so subject ; and the law has therefore provided proper persons to visit them, inquiring into their habits, and correcting irregularities of conduct, and the like.

And as regards (1) *Ecclesiastical* corporations, the ordinary is their visitor ; for the pope formerly,—and

(*e*) 25 & 26 Vict. c. 89, s. 51.

(*g*) Sect. 133.

(*f*) Sect. 129.

(*h*) Sect. 130.

[now the crown,—as supreme ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of all his bishops; and the bishops are, within their several dioceses, the visitors of all deans and chapters, of all rectors and vicars, and of all other spiritual corporations (*i*).] But as regards (2) Lay corporations,—Firstly, of those of the *eleemosynary* kind, the founder and his heirs or assigns are the visitors,—for in a lay incorporation the ordinary cannot visit (*k*); and if the sovereign and a private man join in endowing an eleemosynary foundation, the sovereign alone shall be the founder of it,—for here the royal prerogative prevails. The founder has also a right to appoint a visitor, and to limit the jurisdiction that he is to possess; and if the heirs of a private founder fail, and no visitor has been appointed by him, the right of visitation devolves, in such case, upon the crown, and is exercised on behalf of the crown by the Lord Chancellor, sitting as the representative of the sovereign (*l*). But, Secondly, if the lay corporation be of the *civil* kind, it has no visitor; but the misbehaviours of all civil corporations are inquired into and redressed, and their controversies decided, in the Queen's Bench Division (*m*).

[As regards *hospitals*, if the hospital be spiritual, the bishop shall visit—but if lay, the patron (*n*). The right of lay patrons was, however, abridged by the 2 Hen. V. st. 1, c. 1, which ordained that the ordinary should visit *all* hospitals founded by his subjects,—though the king's right was reserved to visit (by his commissioners) such as were of royal foundation; and although the subject's right was in part restored by the 14 Eliz. c. 5, which directs

(*i*) *Re Dean of York*, 2 Q. B. 1; 233; *Ex parte Wrangham*, 2 Ves. 609.
Reg. v. Dean of Rochester, jun. 609.
 17 Q. B. 1.

(*k*) 1 Bl. Com. p. 480.

(*l*) *Rex v. Catherine Hall*, 4 T.R.

(*m*) *Phillips v. Bury*, Ld. Raym. 8.

(*n*) Year Book, 8 Edw. 3, 28; 8 Ass. 29.

[the bishops to visit such hospitals only where no visitor is appointed by the founders thereof, and all the hospitals (founded by virtue of the statute 39 Eliz. c. 5) are to be visited by such persons as shall be nominated by the respective founders,—still, if the founder appoints nobody, the bishop of the diocese must visit (*o*).

Colleges, as distinguished from *Universities*, are eleemosynary corporations; but the right of visitation was anciently claimed (and, in a sense, usurped) by the ordinary of the diocese,—and in some of the colleges of Oxford, where no special visitor was appointed, the Bishop of Lincoln (in whose diocese Oxford was formerly comprised) has immemorially exercised visitatorial authority,—which can be ascribed to nothing else but his supposed title as ordinary (*p*).] But it is now well established law, that colleges are *lay* corporations,—though sometimes totally composed of ecclesiastical persons (*q*); and that, where the founder has appointed no other visitor, and his heirs become extinct, the right of visitation belongs to the crown,—being exercised by the Lord Chancellor, as the crown's representative.

The duties of the visitor are, generally, to control all irregularities in the institution over which he presides, and to decide and give redress in all controversies arising among the members, as to the interpretation of their laws and statutes (*r*); and, in the exercise of these duties, he is to be guided by the intentions of the founder,—so far as they can be collected from the statutes or from the design of the institution; but otherwise, and as regards the course of proceeding, he is restrained to no particular forms (*s*);

(*o*) 2 Inst. 725.

(*p*) 1 Bl. Com. 483.

(*q*) *Phillips v. Bury*, Ld. Raym. 8.

(*r*) *Dr. Lee's Case*, 1 Ell. Bl. &

(*s*) *Bishop of Ely v. Bentley*,
2 Bro. & C. 220; *R. v. Bishop of
Ely*, 2 T. R. 290; *Re Dean of
York*, 2 Q. B. 1.

and while he keeps within his jurisdiction, his determinations as visitor are final, and examinable in no other court whatsoever (*t*).

IV. [We come now to consider, how corporations may be dissolved,—this question possessing very considerable importance, because the dissolution is the civil death of the corporation, and the corporate lands and tenements thereupon revert to the person (or his heirs) who granted them to the corporation,—for the law doth annex a condition to every such grant, that, if the corporation be dissolved, the grantor shall have again the lands, because the cause of the grant faileth (*u*) ; and further, the debts of a corporation aggregate (either to or from it) are totally extinguished by its dissolution (*x*).

Now, a corporation may be dissolved in various ways:—
(1.) By the loss of such an integral part of its members as is necessary, according to its charter, to the validity of the corporate elections ; for in such cases, the corporation has lost the power of continuing its own succession, and will accordingly be dissolved by the natural death of all its members (*y*),—unless indeed its resurrection is otherwise provided for by statute (*z*). (2.) By surrender of its franchises into the hands of the sovereign,—which is a kind of suicide. (3.) By forfeiture of its charter, through negligence or abuse of its franchises,—in which case, the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the

(*t*) Salk. 403 ; Carth. 180 ; *St. John's College v. Toddington*, 1 Burr. 200 ; *R. v. Bishop of Worcester*, 4 M. & S. 415 ; 2 Lutw. 1566.

(*u*) Co. Litt. 13.

(*x*) *Edmunds v. Brown*, 1 Lev.

237 ; *In re Higginson and Dean*, [1899] 1 Q. B. 325.

(*y*) *R. v. Pasmore*, 3 T. R. 199 ; *R. v. Miller*, 6 T. R. 268 ; *R. v. Morris*, 3 East, 813 ; S. C., 4 East, 17.

(*z*) 11 Geo. 1, c. 4 ; 45 & 46 Vict. c. 50.

[incorporation is void (*a*) ; and the regular course, in such case, is to bring an information, in the nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law for the purposes of the state, in the reigns of King Charles the Second and King James the Second,—particularly by revoking the charter of the city of London,—gave great and just offence ; and the judgment against the validity of the charter of London was reversed by Act of Parliament after the Revolution, and the franchises of the city of London (it was thereby declared) should never more be forfeited for any cause whatever (*b*).]

(*a*) *R. v. Ponsonby*, 1 Ves. jun. 8 ; *Eastern Archipelago Company v. The Queen*, 2 Ell. & Bl. 856. (*b*) 2 W. & M. c. 8 ; *R. v. Amery*, 2 T. R. 515 ; 4 T. R. 122.

CHAPTER I.—SECTION II.

OF MUNICIPAL CORPORATIONS,—AND OF COUNTY COUNCILS,
PARISH COUNCILS, AND DISTRICT COUNCILS.

A MUNICIPAL CORPORATION may be defined as a body politic or corporate, established in some town to protect the interests of the inhabitants. And as regards the first originals of such an institution, it rather appears, that, even prior to the Norman Conquest, there existed the germ of municipal corporations in this country,—it having been usual for such persons of free condition as were not landowners to settle in the towns, under the name of burgesses, and to occupy houses there, as tenants to the crown or to some inferior lord; and (in numerous instances) to form themselves (by licence from the crown) into voluntary associations or fraternities, called *gilds* or *guilds*; and in their capacity of burgesses, they were entitled to certain property, and were exempt from certain liabilities. And soon after the Conquest, and from thence downwards to the time of Henry the Sixth, or thereabouts, charters were from time to time conceded, by the Anglo-Norman kings, to the same towns (and to others), either confirming the former grants, or (as the case might be) conferring new grants (*a*); and by such charters, the boroughs were frequently demised in fee farm to the burgesses (*b*); and they were authorized to have a *guild-merchant*, and to have officers,—such as mayors, aldermen, bailiffs, and the like,—for the government of their towns,

(*a*) Introduction to Domesday,
by Sir H. Ellis, vol. i. p. 191.

(*b*) Madox, *Firma Burgi*, p. 37.

and to hold courts of their own, for the administration of justice within their town precincts (*c*) ; and they enjoyed many other liberties and privileges, of which it may be said, in general, that they chiefly consisted of exemptions from arbitrary taxation and from feudal oppressions. And from about the reign of Henry the Sixth down to the present day, other like charters have been repeatedly granted by our different monarchs ; and in the more recent charters, there are in general contained express words of incorporation, as that the mayor, etc., and burgesses of the particular town, shall be “a body corporate” by the specified name, and by that name shall have perpetual succession, and be competent to sue and be sued, and the like (*d*). And there having been, almost necessarily, a very great want of uniformity among the municipalities so successively created, and also some considerable irregularity (and want of economy) in their administration, therefore, in the year 1835, and as the result of the report thereon of a parliamentary commission, an Act was passed “to regulate the municipal corporations in England and Wales,” and which Act was the 5 & 6 Will. IV. c. 76, commonly called “The Municipal Corporations Act, 1835.”

The Municipal Corporations Act, 1835, continued to regulate these institutions until the year 1882, having been in the meantime successively amended by further Acts, and particularly by the 24 & 25 Vict. c. 75, and 32 & 33 Vict. c. 55 (*e*) ; but in the last-mentioned year, the Act of 1835, together with the amending Acts, were repealed, and their provisions were consolidated (with

(*c*) Madox, *Firma Burgi*, 28, 116, 136, 139.

(*d*) *Ibid.* 28.

(*e*) The prior Municipal Corporation Acts are enumerated in the

schedule to the Municipal Corporations (New Charter) Act, 1877 (40 & 41 Vict. c. 69), and also in the schedules to the Municipal Corporations Act, 1882.

amendments) in the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). And by the last-mentioned Act,—which, along with the Municipal Corporations Act, 1883, extends to all cities and boroughs (*f*) to which the Municipal Corporations Act, 1835, extended on the 1st January, 1883, and also to all towns, districts, or places becoming incorporate after that date, and being by charter brought within its provisions,—all corporate towns are placed under one constitution and plan of administration, the key-note or governing principle of which is, that the municipalities shall manage their own affairs, by municipal councils of their own election.

And for this purpose, the Act proceeds, first, to define who shall be the electors of the municipal council ; and by sect. 9, a *burgess* or *freeman* is defined (*g*) as a person of full age, not an alien, nor having received within the preceding twelve months parochial relief or other alms (*h*),—and who on the fifteenth day of July in any year shall have occupied any house, warehouse, counting-house, shop, or other building within the borough during the whole of the preceding twelve months ; and during such occupation, shall have resided within the borough, or within seven miles thereof ; and shall, during such time, have been rated, in respect of such premises, to all rates for the relief of the poor, and have paid (on or before the 20th of July in such year) all such poor and borough rates, in respect of

(*f*) As to the *boundaries* of boroughs (municipal and parliamentary), see 2 & 3 Will. 4, c. 64 ; 6 & 7 Will. 4, c. 103 ; 7 Will. 4 & 1 Vict. c. 78, ss. 29, 41 ; 30 & 31 Vict. c. 102 ; 31 & 32 Vict. c. 46 ; 34 & 35 Vict. c. 67 ; and now sects. 228, 229 of the Act of 1882 (*municipal*), and sects. 6 to 8 of the 48 & 49 Vict. c. 23 (*parliamentary*). See also 50 & 51 Vict.

c. 61 ; and 56 & 57 Vict. c. 9.

(*g*) 45 & 46 Vict. c. 50, s. 9.

(*h*) The receipt of medical or surgical assistance from any municipal charity, or treatment in a hospital, is not a disqualification ; nor is the education of the burgess's child in any public or endowed school. (45 & 46 Vict. c. 50, s. 33.)

the same premises, as shall have been payable up to the preceding 5th of January; and he must have been duly inrolled as a burgess on the *burgess roll* (*i*); but when the qualifying premises come to the party by descent, marriage, marriage settlement, devise, or promotion to any benefice or office, the occupancy and rating of the predecessor may be reckoned as part of the twelve months (*k*); and to the qualifications prescribed by the Municipal Corporations Act, 1882, sect. 9, the ten pounds occupation qualification under the Registration Act, 1885, has now been added by the County Electors Act, 1888 (*l*).

The Act also provides, that in every borough there shall be elected annually a “mayor” (*m*),—and periodically a certain number of “aldermen” and of “councillors” (*n*),—who together shall constitute “the council” of the borough (*o*);—that they shall be respectively chosen from among persons on (and entitled to be on) the burgess list (*p*), and otherwise qualified as in the Act described (*q*);

(*i*) As to the burgess roll, see 45 & 46 Vict. c. 50. s. 45; also 5 & 6 Will. 4, c. 76, s. 22; 7 Will. 4, & 1 Vict. c. 78; 20 & 21 Vict. c. 50, ss. 6, 7; *Hunt v. Hibbs*, 5 H. & N. 123; *Ex parte Hindmarch*, Law Rep., 3 Q. B. 12; *The Queen v. Tugwell*, *ib.* 704.

(*k*) 45 & 46 Vict. c. 50, s. 33; and (as to female burgesses) s. 63, following 32 & 33 Vict. c. 55, s. 9; *The Queen v. Harrauld*, L. R. 7 Q. B. 361.

(*l*) 51 & 52 Vict. c. 10, s. 3.

(*m*) 45 & 46 Vict. c. 50, s. 61. By ss. 16 and 67, provision is made (following 16 & 17 Vict. c. 79, ss. 7, 8) for the death, illness, absence, or incapacity of the mayor (or other municipal officer). By 6 & 7 Will. 4, c. 105, s. 4, the

mayor was to hold over after his year, till acceptance of office by his successor; and there is a similar provision in the Act of 1882, s. 15. By 3 & 4 Vict. c. 47, the mayor might be re-elected; and there is a similar provision for his re-election in the Act of 1882, s. 37.

(*n*) 45 & 46 Vict. c. 50, s. 10.

(*o*) *Ibid.*

(*p*) “The Parliamentary Registration Acts” (as to which *vide sup.* vol. II. p. 321), apply also *mutatis mutandis*, to the making out and revision of the burgess list (see 41 & 42 Vict. c. 26, ss. 15, 18; 45 & 46 Vict. c. 50, ss. 44, 45; and 54 & 55 Vict. c. 68, ss. 2, 3).

(*q*) 45 & 46 Vict. c. 50, ss. 11, 12.

—that the councillors shall be elected by the burgesses (*r*), the election being conducted in the same manner as under the Ballot Act, 1872 (35 & 36 Vict. c. 33), and being subject to the like provisions, as to corrupt practices and the like, as parliamentary elections are subject to, —and in the case of the larger boroughs, divided into wards, the election of the councillors for the different wards is to be made by the burgesses of the respective wards (*s*),—and the mayor and aldermen are to be elected by the council (*t*);—and the council is to meet once a quarter (and oftener if due notice be given), for the transaction of the general business of the borough (*u*), a majority of the members present (if those present amount to one third of the whole) carrying every decision at the meeting, the mayor (or other the member presiding in his absence) having a casting vote (*x*);—and at any meeting, the council may make bye-laws, for the good rule and government of the borough, for the prevention and suppression of nuisances, and for the imposition of fines on persons in that behalf offending (*y*). And it is required, that the burgesses shall annually elect (*z*), from among those qualified to be councillors, two auditors and two assessors,—the former to audit the accounts of the borough, the latter to assist in revising the burgess list; and there is also to be a third auditor, appointed by the mayor, and called the mayor's auditor (*a*). The council shall also appoint a town clerk, and a treasurer (neither of whom

(*r*) 45 & 46 Vict. c. 50, ss. 11, 12.

(*s*) 45 & 46 Vict. c. 50, s. 30;
Baker v. Marsh, 4 El. & Bl. 144;
The Queen v. Parkinson, Law
Rep., 3 Q. B. 11.

(*t*) 45 & 46 Vict. c. 50, ss. 14,
15.

(*u*) 45 & 46 Vict. c. 50, s. 22,
and 2nd schedule to Act.

(*x*) 45 & 46 Vict. c. 50, s. 22,
and 2nd schedule to Act.

(*y*) *Ibid.* s. 23.

(*z*) *Ibid.* s. 25.

(*a*) 45 & 46 Vict. c. 50, ss. 25,
29, 62; *Searle v. The Queen*, 8
El. & Bl. 22; *The Queen v. The
Mayor of Rochester*, 1 E. Bl. & E.
1024.

is to be a member of the council), and such other officers as have been usual or as are necessary, with power also to fix their salaries (*b*) ; and, if the borough have a separate court of quarter sessions, the council shall appoint a clerk of the peace (*c*), and also a coroner (*d*),—except in quarter sessions boroughs with a population of less than 10,000 in 1881, where the power of appointment of coroner is transferred to the county council (*e*). It may be added that the clerk of the peace of a county is appointed by the standing joint committee of the county council and quarter sessions (*f*), and that a county coroner is appointed by the county council (*g*).

And as regards boroughs desiring to have a separate court of quarter sessions, the Municipal Corporations Act, 1882, provides, that the council of any such borough may petition the crown for that purpose (*h*) ; and if the application be granted, the crown will appoint a barrister at law to be recorder of the borough, and he shall not only be sole judge of such court of quarter sessions, but also of the borough court of record for civil actions, if there be any,—provided that such court of record be not regulated by any Act of Parliament (*i*) ; and if the borough desire it, a stipendiary magistrate or magistrates may also be appointed for the borough (*k*). Moreover, to boroughs having a separate court of quarter sessions, the crown is

(*b*) 45 & 46 Vict. c. 50, ss. 17, 18, 19.

(*c*) *Ibid.* s. 164.

(*d*) *Ibid.* s. 171.

(*e*) 51 & 52 Vict. c. 41, s. 38.

As to county boroughs not being quarter sessions boroughs, see 51 & 52 Vict. c. 41, s. 34.

(*f*) *Ibid.* s. 83.

(*g*) *Ibid.* s. 5.

(*h*) 45 & 46 Vict. c. 50, s. 162.

(*i*) As to the borough courts of record, see 45 & 46 Vict. c. 50, ss. 165, 175 ; also 6 & 7 Will. 4, c. 103, s. 9 ; 7 Will. 4 & 1 Vict. c. 78, s. 31 ; 2 & 3 Vict. c. 27 ; 15 & 16 Vict. c. 76, s. 228 ; 17 & 18 Vict. c. 125, s. 105 ; 23 & 24 Vict. c. 126, s. 44 ; 35 & 36 Vict. c. 86.

(*k*) 45 & 46 Vict. c. 50, s. 161.

empowered to grant a commission of the peace (*l*), and to nominate such persons to be justices within the borough as it shall think proper (*m*); and among such justices, the mayor (during his mayoralty), and also the recorder, are included by virtue of their offices (*n*); and in the case of such boroughs, if they were previously exempt from the jurisdiction of the county justices by reason of a *non-intromittant* clause in their charter (*o*), they continue to be so exempt, but otherwise the county justices have *concurrent* jurisdiction (*p*); and, of course, where the borough has *no* separate quarter sessions, the county justices have jurisdiction within the borough.

It is provided also, that the council shall not, except with the approval, formerly of the Lords of the Treasury, but now of the Local Government Board (*q*), sell or mortgage the lands or public stock of the borough, or demise such lands for more than a certain term (*r*); and that the rents, profits, and interest of all corporate property shall be paid to the treasurer, and be carried to the account of the *borough fund* (*s*),—which fund, after discharging debts (*t*), is to be applied in or towards the payment of salaries, the expenses connected with the corporate elections, prosecutions, constabulary, prison accommodation, and other public purposes (*u*),—the surplus (if any) being expended for the public benefit of the

(*l*) 45 & 46 Vict. c. 50, s. 156.

(*m*) As to the borough justices, see also 7 Will. 4 & 1 Vict. c. 78, ss. 30, 31; 12 & 13 Vict. cc. 8, 18, 64; 13 & 14 Vict. c. 91; 15 & 16 Vict. c. 38; 18 & 19 Vict. c. 126; 24 & 25 Vict. c. 75, s. 3; and as to their *clerk*, see *The Queen v. Fox*, 1 E. & E. 729, and 24 & 25 Vict. c. 75, s. 5; also, 51 & 52 Vict. c. 23.

(*n*) 45 & 46 Vict. c. 50, s. 155

(mayor); s. 63 (recorder); and 51 & 52 Vict. c. 23.

(*o*) *R. v. Sainsbury*, 4 T. R. 451.

(*p*) 2 Arch. Just, 26.

(*q*) 51 & 52 Vict. c. 41, s. 72.

(*r*) 45 & 46 Vict. c. 50, s. 108.

(*s*) *Ibid.* s. 139.

(*t*) *Ibid.* ss. 112, 113.

(*u*) *Ibid.* s. 140, and 5th schedule to Act.

inhabitants (*x*), and the deficiency (if any) being made up by a rate (*y*),—and the borough accounts are to be, at all times, open to inspection, and also regularly audited, and printed for the use of the ratepayers (*z*), and submitted to the Secretary of State, and by him laid before Parliament (*a*).

The Municipal Corporations Act, 1835, distinguished between the rights newly conferred by that Act, and the antecedent rights of the corporators,—both with regard to the corporate property, and with regard also to the parliamentary franchise. And, Firstly, as to the corporate property, it provided, that every inhabitant, and every person admitted a freeman or burgess, and the wife, widow, son, or daughter of any freeman or burgess, and every person married to the daughter or widow of a freeman or burgess, and every apprentice,—should respectively enjoy the same share and benefit of the lands and public stock of the borough, as he or she might have enjoyed in case the Act had not been passed,—subject only to this limitation, namely, that the total amount to be divided among such persons should not exceed the surplus which remained after payment of the expenses charged by the Act upon the borough fund (*b*). And, Secondly, as to the parliamentary franchise, the Act provided, that every person who would or might, as a burgess or freeman have had the right of voting in the election of members of parliament if the Act had not passed, should continue entitled to that right (*c*); and for the purposes of such reserved rights, the Act required the town clerk of every borough to make out a list (to be called *the freemen's roll*) of all persons admitted burgesses or freemen (*d*),—as

(*x*) 45 & 46 Vict. c. 50,
s. 115.

(*y*) *Ibid.* s. 144.

(*z*) *Ibid.* ss. 26, 27.

(*a*) *Ibid.* s. 28.

(*b*) 5 & 6 Will. 4, c. 76, s. 2.

(*c*) *Ibid.* s. 4; 7 Will. 4 & 1 Vict.
c. 78, s. 27.

(*d*) 5 & 6 Will, 4, c. 76, s. 5.

distinguished from the burgesses newly created by the Act, and who were to be entered on another roll (to be called the *burgess roll*) ; and the Municipal Corporations Act, 1882, has enacted that the *freemen's* roll shall continue to be kept (*e*) ; and the property rights of such freemen are preserved (*f*) ; and also their parliamentary franchises (*g*).

The Municipal Corporations Act, 1835, introduced also other innovations upon the laws and customs which formerly prevailed in corporate towns. For while, before that Act, the title of burgess (or the freedom of the city, as it was called), was generally acquired by birth, marriage, or servitude (that is, by being born of a freeman, by marrying the daughter or widow of a freeman, or by apprenticeship for seven years within the borough to a freeman), or by gift or purchase,—the Act provided, that no person should in future be made a burgess or freeman by gift or purchase (*h*) ; and although by the Honorary Freedom of Boroughs Act, 1885 (48 & 49 Vict. c. 29), the council may confer the freedom of the borough upon distinguished persons, yet this distinction is not to entitle such freemen to vote at any parliamentary or other election for the borough, or to participate in the corporate property of the borough. The Act of 1835 abolished also (though with a reservation of the rights of claimants living at the date of the statute) the exemptions that had theretofore been ordinarily claimed by burgesses, inhabitants, or the like, from such tolls or dues as were levied to the use of the body corporate (*i*). And whereas, before the Act, in divers boroughs, a custom had prevailed, and bye-laws had been made, that no person not being free of the borough, or of certain guilds, mysteries, or trading companies

(*e*) 45 & 46 Vict. c. 50, s. 203.

(*f*) *Ibid.* ss. 205—208.

(*g*) *Ibid.* s. 209.

(*h*) 5 & 6 Will. 4, c. 76, s. 3.

(*i*) *Ibid.* s. 2 ; 6 & 7 Will. 4,

c. 104, s. 9.

therein, should keep a shop for merchandise, or use certain trades or occupations for gain within the same,—the Act provided, that every person might in future keep any shop in the borough, and use every lawful trade and occupation therein, any such custom or bye-laws notwithstanding (*k*),—all which innovations (it need hardly be mentioned) are maintained by the Municipal Corporations Act, 1882.

The principle of self-government which (as we have seen) is at the root of the municipal corporation, has been recently extended from the borough to the county, by the Local Government Act, 1888 (51 & 52 Vict. c. 41); and in order to work out more effectually the system which the Act has established, certain changes of a material character have been thereby made as regards certain of the municipal corporations before treated of.

And, firstly, the Act has established a council (called the county council) in every administrative county, and has entrusted to such council the administrative and financial business of the county (sect. 1); and it has transferred to the county council all the administrative business of the justices of the county in quarter sessions assembled, in respect of all the various matters enumerated in the third section of the Act, and hereinafter more particularly referred to; and also the business of the justices of the county out of session, in respect of the licensing of stage plays, and the execution of the provisions of the Explosives Act, 1875 (sect. 7),—but not any judicial business of the quarter sessions, or of the justices of the county as regards rating appeals; or, in fact, any other judicial business (sects. 8, 78); and the county police have been placed under the joint control of the quarter

(*k*) 5 & 6 Will. 4, c. 76, s. 14.

sessions and the county council, such joint control being exercised through a standing joint committee (sect. 9).

Secondly, the county council has been made elective ; and the election is conducted, in general, as in the case of the election of the council of a borough divided into wards, but the divisions of the county are called electoral divisions and not wards (sect. 2) ; and the electors (in the case of boroughs returning one or more county councillors) are the burgesses thereof enrolled in pursuance of the Municipal Corporations Act, 1882, and (in the other parts of the administrative county) are the persons registered as county electors under the County Electors Act, 1888 (*l*) ; and these elections are now, as to the date thereof, regulated by the 54 & 55 Vict. c. 68, it being thereby provided that the day for these elections shall be the 8th day of March, or some day between the 1st and 8th day of March.

Thirdly, the county council consists of a chairman, aldermen, and councillors (*m*), the aldermen being called county aldermen, and the councillors being called county councillors. The council is a body corporate, by the name of the administrative county, with perpetual succession, a common seal, and power to hold lands without licence in mortmain (*n*) ; and the clerk of the peace for the county is made the clerk of the county council (*o*). The chairman is elected by the council, and the aldermen are elected by the councillors, the election of aldermen being conducted in like manner as the like election under the Municipal Corporations Act, 1882 (*p*) ; and a councillor may be

(*l*) 51 & 52 Vict. c. 10 ; 52 & 53 Vict. c. 19.

(*m*) Clerks in holy orders and other ministers of religion are eligible either as aldermen or as councillors ; also, peers qualified by owning property in the county ;

also, all persons registered as parliamentary voters, in respect of the ownership of property within the county. (Sect. 2.)

(*n*) 51 & 52 Vict. c. 41, s. 79.

(*o*) *Ibid.* s. 83.

(*p*) *Ibid.* s. 75.

elected an alderman,—the county councillors being elected for a term of three years ; when they retire, and a new election takes place (*g*), the 16th day of March in lieu of the 8th day of November, being the day which, by the 54 & 55 Vict. c. 68, is now appointed for these elections (*r*).

Fourthly, the Act constitutes each of certain boroughs an administrative county of itself, these being the boroughs named in the third schedule to the Act, and each of which, on the 1st June, 1888, either had a population of not less than 50,000, or was a county of itself ; and all such boroughs are to be distinguished as “county boroughs” (*s*).

Fifthly, the Act constitutes the Metropolis an administrative county by the name of “the administrative county of London” (*t*) ; and, for all non-administrative purposes, constitutes also a “county of London,” consisting of those parts of the counties of Middlesex, Surrey, and Kent, which fall within the area of the administrative county of London ; but the county of the city of London, for all non-administrative purposes, continues a separate county (*u*). The county councillors for the administrative county of London are double the number of members of parliament returned for the Metropolis, each borough (or division of a borough) being made an electoral division of the administrative county ; but the number of county aldermen is not to exceed one-sixth of the whole number of county councillors (*x*) ; and all the powers, duties, and liabilities of

(*g*) 51 & 52 Vict. c. 41, s. 2.

(*r*) 59 & 60 Vict. c. 22.

(*s*) 51 & 52 Vict. c. 41, s. 31.

(*t*) *Ibid.* s. 40.

(*u*) *Ibid.* s. 40.

(*x*) As to the three ridings of Yorkshire, the three divisions of Lincolnshire, the two divisions of Sussex, the two divisions of Suffolk, the two divisions of the

county of Cambridge, and the two divisions of the county of Northampton, see sect. 46,—each riding or division being made a separate administrative county; and (under the 60 & 61 Vict. c. 39) the three ridings of Yorkshire are specifically made separate counties for all the purposes of the Coroners Acts, 1844 to 1892.

the Metropolitan Board of Works are transferred to the county council of the administrative county of London (*y*),—and (among these) the power of borrowing (*z*) ; and these powers have been since largely increased, but only for the due execution of the onerous duties entrusted to the council (*a*).

The financial and administrative business of the county council extends to and includes (*b*) (among other less important matters) the making, assessing, and levying of county rates, police rates, and rates generally,—and the application and expenditure of the money received on account of such rates ; the borrowing of money and the passing of the accounts of the county treasurer ; the provision, enlargement, maintenance, management, and visitation of pauper lunatic asylums, and of reformatory and industrial schools ; the payment of compensation, payable formerly by the hundred or by the inhabitants of a county and now payable by the county council (*c*), under the Riot (Damages) Act, 1886 ; the registration of the rules of scientific societies ; the registration of charitable gifts, the certifying of places of religious worship, and the confirming of the rules of loan societies ; also, the maintenance of the assize courts, lock-up houses, police-stations, and county buildings generally ; the maintenance of bridges and of roads repairable with bridges (and of

(*y*) 51 & 52 Vict. c. 41, s. 40.

(*z*) See the Metropolitan Board of Works (Loans) Acts, 1869 to 1871 (32 & 33 Vict. c. 102 ; 33 & 34 Vict. c. 24 ; and 34 & 35 Vict. c. 47) ; and the Metropolitan Board of Works (Money) Acts, 1875 to 1888 (38 & 39 Vict. c. 65 ; 39 & 40 Vict. c. 55 ; 40 & 41 Vict. c. 52 ; 41 & 42 Vict. c. 37 ; 42 & 43 Vict. c. 69 ; 43 & 44 Vict. c. 25 ; 44 &

45 Vict. c. 48 ; 45 & 46 Vict. c. 33 ; 46 & 47 Vict. c. 27 ; 47 & 48 Vict. c. 50 ; 48 & 49 Vict. c. 50 ; 49 & 50 Vict. c. 44 ; 50 & 51 Vict. c. 31 ; 51 & 52 Vict. c. 40 ; 52 & 53 Vict. c. 61).

(*a*) 52 & 53 Vict. c. 61 ; 53 & 54 Vict. c. 41 ; 54 & 55 Vict. c. 62.

(*b*) 51 & 52 Vict. c. 41, s. 3.

(*c*) *Ibid.* s. 79.

main roads) (*d*) ; the enforcement of the Contagious Diseases (Animals) Acts, and of the Acts relating to destructive insects, and to the protection of fish and of wild birds, and to the prevention of river pollution ; the supervision of weights and measures, and of gas-meters ; the conduct of parliamentary elections (including the registration of voters and the revision of the lists of voters) ; the appointment and payment of medical officers (*e*), and of public inspectors and analysts, and the like ; and of the county treasurer and county surveyor ; and of the coroner for the county (*f*), and of district coroners ; also, all business formerly done by the justices of the county in quarter sessions in respect of music and dancing licences and race-course licences (*g*), or done by the justices out of sessions in respect of the licensing of houses or places for the public performance of stage plays, or in respect of the execution (as local authority) of the Explosives Act, 1875. But as regards the maintenance of main roads, the urban authority of the district may retain the duty of maintaining and repairing same (*h*), as ordinary roads, receiving in that case from the county council an annual contribution towards the costs of such maintenance and repair (*i*) ; and the county council may also contribute to the cost of any highway or public footpath in their county, although the same should not be a main road. Every county council may also make bye-laws within their county, relating to all or any of the matters aforesaid, in like manner as the council of a borough may make bye-laws, in relation to their borough, under the Municipal Corporations Act, 1882 ;

(*d*) 51 & 52 Vict. c. 41,
s. 11.

(*e*) *Ibid.* s. 17.

(*f*) *Ibid.* s. 5.

(*g*) *Ibid.* s. 3.

(*h*) *Ibid.* s. 11.

(*i*) *Ibid.* s. 11 ; and as to roads in the Isle of Wight, see 51 & 52 Vict. c. 41, s. 12 ; and as to roads in South Wales, see 51 & 52 Vict. c. 41, s. 13 ; also, 23 & 24 Vict. c. 68 ; and 41 & 42 Vict. c. 34.

but the bye-laws of a county council are to be inoperative in any borough (*k*).

The Local Government Act, 1888, also provides for the establishment of a local taxation account for each administrative county, into which account are to be paid the proceeds of the duties collected within the county by the Inland Revenue Commissioners on the local taxation licences specified in the first schedule to the Act (*l*),—being wine and spirit licences, ale and beer and tobacco licences, game licences, carriage taxes, and the like ; and the amount so paid into such account, is to be paid out to the county council for the uses of the county, being in lieu of the grants from the Imperial Exchequer theretofore usual in aid of local taxation ; and such payments to the county council are placed to the exchequer contribution account of the council (*m*). The Act also provides for payment to the like account, and for the like uses, of four fifth parts of one equal half part of the probate duties collected each year within the county (*n*), (or now the equivalent amount of the estate duty) (*o*), such latter grant being also in lieu of the imperial grants theretofore made in aid of local taxation ; and there are elaborate provisions contained in the Act providing for the distribution and application of such local taxation and probate duty (or estate duty) grants respectively,—the county council being required, *e.g.*, to pay, out of the Exchequer Contribution Account, to the guardians of poor law unions a certain amount (to be certified by the Local Government Board) towards the remuneration of teachers in poor law schools and of public vaccinators, and also the school fees paid for pauper children sent from workhouses to public elementary schools ; and the county council is required also to pay to the local

(*k*) 51 & 52 Vict. c. 41, s. 16.

(*n*) *Ibid.* ss. 21, 22, 24.

(*l*) *Ibid.* s. 20.

(*o*) 57 & 58 Vict. c. 30, s. 19.

(*m*) *Ibid.* s. 23.

authority one half the salary of the medical officer and nuisance inspector of such authority ; and to pay a certain amount to the registrars of births and deaths, and four shillings a week for the maintenance of every pauper lunatic chargeable to the county, or to any poor law union wholly or partly within the county, or to any borough within the county ; and the county council is required to transfer to the police account of the county one half of the cost of the pay and clothing of the county police, and to pay to the council of every borough, maintaining a separate police force under the County and Borough Police Acts, one half of the cost of the pay and clothing of such police force ; besides making certain other payments.

And the Local Government Act, 1888, provides,—for the purposes of the police, and of the clerk of the peace, and the clerks of the justices, and joint officers, and of matters requiring to be determined jointly by the quarter sessions and the council of a county,—that there shall be a standing joint committee of the quarter sessions and the county council (*p*), consisting of such equal number of justices appointed by the quarter sessions, and of members of the county council appointed by that council, as may from time to time be arranged between the quarter sessions and the council ; and in default of arrangement, such number, taken equally from the quarter sessions and the council, as may be directed by a secretary of state ; and it is provided, that any dispute arising under the Act with respect to the police, or to the clerk of the peace, or to clerks of the justices, or to officers who serve both the quarter sessions or justices and the county council, or to the provision of accommodation for the quarter sessions or for the justices out of session, or to the use by them or the police or by the said clerks of any buildings, rooms, or

premises, or with respect to anything incidental to the above-mentioned matters, and any other matter requiring to be determined jointly by the quarter sessions and the county council, shall be referred to and determined by the joint committee; and the expenditure required for the purposes of the matters above mentioned, is to be paid out of the county fund, and the county council is to provide for such payment accordingly (*q*).

The county council has succeeded to all the property and also to all the liabilities of the county, and has acquired full powers of management, and also full power (with the sanction of the Local Government Board) to alienate the county property (*r*); and is enabled to acquire lands as fully as any urban authority under the Public Health Act, 1875 (*s*); and all moneys received by the county council are to be carried to the county fund, and all payments for general county purposes, or for special county purposes, are to be paid in the first instance out of the county fund,—general county purposes being purposes affecting the administrative county generally, and special county purposes being purposes affecting a part or parts only of such county (*t*).

The county council may also (with the sanction of the Local Government Board) borrow money on the security of the county revenues (*u*), up to the extreme limit of one-tenth of the rateable value of the rateable property within the county,—but not beyond that limit, except under the authority of a provisional order of the Local Government Board, confirmed by Act of Parliament; and such loans may be contracted for any of the purposes for which quarter sessions are authorized to borrow, or for

(*q*) See also the 32 & 33 Vict. c. 49 (Local Stamp Act, 1869); and 59 & 60 Vict. c. 55 (Quarter Sessions for London Act, 1896).

(*r*) 51 & 52 Vict. c. 41, s. 64.

(*s*) *Ibid.* s. 65.

(*t*) *Ibid.* s. 68.

(*u*) *Ibid.* s. 69.

the discharge of old loans, and for many other purposes specified in the Act (*x*) ; and the county council may raise any such moneys, either as one loan or as several loans, and either by stock issued under the Act, or by debentures or annuity certificates under the Local Loans Act, 1875, or by mortgage (in special cases) under the provisions of the Public Health Act, 1875 (*y*) ; and generally, county stock may be created and issued, transferred, dealt with, and redeemed, as provided by the regulations in that behalf made by the Local Government Board (*z*).

The receipts and expenditure of every county council are to be annually audited by district auditors appointed by the Local Government Board (*a*), up to the end of each financial year, *i.e.*, for the twelve months ending the 31st March in each year ; and at the beginning of each financial year, the county council is to estimate the amount required for the first six months and for the second six months of the then next financial year (*b*) ; and is to appoint a finance committee for regulating and controlling the finances of the county ; and a resolution of the council, on the recommendation of such committee, is necessary to any order of the council for payment of any sum out of the county fund (*c*) ; and all payments to or out of the county fund are to be made through the county treasurer.

Where the administrative county is a county borough, the council of the county borough has in general all the like powers and is under all the like duties and liabilities as the county council, and is entitled to participate in the proceeds of the duties carried to the local taxation account,

(*x*) 51 & 52 Vict. c. 41, s. 69.

(*y*) *Ibid.*

(*z*) *Ibid.* s. 70 ; 58 & 59 Vict.

(*a*) 51 & 52 Vict. c. 41, s. 71.

(*b*) *Ibid.* s. 74.

(*c*) *Ibid.* s. 80.

and in the probate duty (estate duty) grant (or equivalent collection) for the county in which the county borough is (or is to be deemed as being) situate; and the council of the county borough makes the like payments thereout as are made by the county council (*d*); and all necessary equitable adjustments between the county council and the council of the county borough are to be made (*e*). The bridges within the borough repairable by the county, and the main roads within the borough, are made repairable by the county borough; and the council of the county borough may appoint the coroner where the district of the county coroner is wholly situate within the county borough (*f*). And where a borough is a quarter sessions borough, and has a population of 10,000 and upwards, according to the census of 1881, but is not made a county borough by the Act, it falls indeed within the administrative county in which it is situate, but the powers, duties, and liabilities of the council of the borough under the Municipal Corporations Act, 1882, remain with the council of the borough, and do not pass to the county council (*g*). Nevertheless, the parishes within the borough are made liable to contribute, as a general rule, to the costs of all general county purposes, but with certain exemptions (*h*). Also, the county council succeeds to the powers, duties and liabilities of an administrative character which were theretofore vested in the court of quarter sessions or justices of any borough, which is not made a county borough (*i*).

And generally as regards any differences arising between or among adjoining councils (or other adjoining local authorities), the decision thereof is committed to the Local

(*d*) 51 & 52 Vict. c. 41, ss. 32—
34.

(*e*) *Ibid.* s. 32.

(*f*) *Ibid.* s. 34.

(*g*) *Ibid.* s. 35.

(*h*) *Ibid.*

(*i*) *Ibid.* ss. 36, 39.

Government Board,—which may either itself arbitrate the matter, or refer it to some other arbitrator (*k*).

By subsequent Acts, county councils have been authorized to contribute (out of the county fund and as portion of their general expenses) to the funds of the Association of County Councils,—an association formed for the purpose of consultation as to various matters of local government (*l*); also, to concur with the councils of adjoining counties, in relation to the construction and maintenance (and to the alteration) of main roads and highways, and of bridges (including the approaches thereto) (*m*); and to contribute to the expenses of enquiries before the charity commissioners touching any charity in which their county is interested (*n*); and to buy up manorial franchises relative to weights and measures (*o*),—besides the numerous other matters, of a greater or less importance, entrusted to these councils and to the parish councils shortly to be mentioned, relative to allotments and small holdings (*p*), and to the protection of public rights (*q*), and the like; and they may also cause barbed-wire fencing along highways to be removed, when likely to be a nuisance to man or beast (*r*).

The principle of local self-government, first introduced by the Municipal Corporation Acts, and afterwards largely extended (as we have just seen) by the Local Government Act, 1888, received a still more considerable extension under the Local Government Act, 1894 (56 & 57 Vict. c. 73). For, under the provisions of that Act, there has been appointed, for every rural parish throughout England and Wales containing a population of 300 or upwards, a

(*k*) 51 & 52 Vict. c. 41, ss. 11,

63; 59 & 60 Vict. c. 9.

(*l*) 53 & 54 Vict. c. 3.

(*m*) 54 & 55 Vict. c. 63.

(*n*) 55 & 56 Vict. c. 15.

(*o*) *Ibid.* c. 18.

(*p*) 53 & 54 Vict. c. 65; 55 & 56 Vict. c. 31; 56 & 57 Vict. c. 73.

(*q*) 56 & 57 Vict. c. 73.

(*r*) *Ibid.* c. 32.

parish council elected by the parochial electors on the register (*s*) ; and provision is made for creating also a like council (to be similarly elected) for every rural parish having a less population than 300 ; and every rural parish is created a parish meeting (sect. 1). Every such parish council (sect. 3) is constituted a body corporate, by the name of the parish council of the parish ; and when there is (and while there is) no parish council, but only a parish meeting, for any rural parish, the chairman of such meeting and the overseers of such parish (sect. 19), are constituted a body corporate, by the name of the chairman and overseers of the parish ; and each of such corporate bodies (council or meeting) is to have all the incidents of a corporation, and with power to hold lands without a licence in mortmain. Also, where a rural parish is situate partly within, and partly without, a rural sanitary district, each part of such parish is, for the purposes of the Act, made a parish of itself, as if it had been so constituted under the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61) ; and for the purposes of the Act, parishes may be divided into wards (sect. 18), with councillors separately elected for each ward. The annual assembling of the parish meeting is to be held on some day between the 1st March and 1st April in every year (*t*).

To the parish councils and parish meetings so constituted, in rural parishes, are entrusted (among many other details) the following powers and duties (sects. 5, 6), that is to say :—(1) The power and duty of appointing overseers of the poor, and the power of appointing (and of revoking the appointment of) an assistant overseer ;

(*s*) By sect. 44, this register is the local government register of electors and the parliamentary register of electors, so far as they relate to the parish or (as the case

may be) to the parish ward,—as amended by the 59 & 60 Vict. c. 4.

(*t*) 60 & 61 Vict. c. 1.

(2) The powers, duties, and liabilities of the vestry of the parish (except so far as relates to the affairs of the church, or to ecclesiastical charities) ; (3) The powers, duties, and liabilities of the churchwardens of the parish (except as aforesaid), including their duties with respect to maintaining and repairing closed churchyards wherever the expenses of such maintenance and repair are, under the Burial Act, 1855, repayable out of the poor rate after the churchwardens have given, under that Act, a certificate of their expenses ; (4) The powers, duties, and liabilities of the overseers, or of the churchwardens and overseers, of the parish, relative to valuation lists (appeals and objections therefrom or thereto), or relative generally to the poor rate, or to the county rate, or to the basis of the county rate ; and relative to the provision of parish books, and of a parochial office, or vestry room, and of a parish chest ; and relative to a fire engine or fire escape ; and relative to the holding or management of the parish property (other than property belonging to the church, or held for any ecclesiastical charity) ; and relative to the holding or management of village greens, and of allotments, whether for recreation grounds, or for gardens, or otherwise for the benefit of the inhabitants, or any of them ; and (5) The powers exerciseable, with the approval of the Local Government Board, by the board of guardians for the poor law union comprising the parish, in respect of the sale, exchange, or letting of any parish property.

And in addition to the powers above referred to, the parish council, or parish meeting, may also make the complaints, as to unhealthy dwellings for artisans, appointed by the 53 & 54 Vict. c. 20 ; and the representations required to be made by the 50 & 51 Vict. c. 48 and 53 & 54 Vict. c. 65, with regard to allotments ; and two members of the parish council, or (as the case may be) parish meeting, are constituted (in effect) allotment

wardens or managers under the Small Holdings Act, 1892 (55 & 56 Vict. c. 31); and the parish meeting has the exclusive power (in rural parishes) of adopting such Acts as the Baths and Washhouses Acts, 1846 to 1882, and the Public Libraries Act, 1892, and other like Acts, called by way of distinction “Adoptive Acts,” tending to secure the physical and moral health and recreation of the people. And the parish meeting may also (sect. 8) exercise (either alone or concurrently with other adjoining parishes) the specific powers following, that is to say :—power to provide suitable offices, and to provide or acquire land for that purpose ; power to provide, or acquire land for, a recreation ground, or for public walks ; power to intervene, by application to the Board of Agriculture and otherwise, in the protection of common rights, and for the regulation of commons, and generally to exercise, with respect to any recreation ground, village green, open space, or public walk, which is for the time being under their control, or to the expense of which they have contributed, all the powers exercisable by an urban authority under the Public Health Acts ; also, power to utilise any spring, well, or stream within their parish, and to provide facilities for obtaining water therefrom, but so as not to interfere with the rights of any corporation or person, together with power to deal with any pond, pool, open ditch, drain, or place containing, or used for the collection of, any drainage, filth, stagnant water, or matter likely to be prejudicial to health, but so as not to interfere with any private right, or the sewage or drainage works of any local authority ; also, power to acquire by agreement any right of way, whether within their parish or an adjoining parish, the acquisition of which is beneficial to the inhabitants of the parish or any part thereof ; and to accept and hold any gifts of property, real or personal, for the benefit of the inhabitants of the parish or any part

thereof; also, power generally to execute any works in relation to any parish property (other than property belonging to the church, or held for an ecclesiastical charity); and when the parish council is unable, by agreement, to procure suitable land for its necessary purposes or for allotments, it is to bring the matter under the notice of the county council within whose district the rural parish is situated; and the latter council may proceed to enable the parish council to acquire the requisite land compulsorily, that is to say, under the provisions in that behalf of the Lands Clauses Consolidation Act, 1845, and the Public Health Act, 1875.

Also, for any of the following purposes (sect. 12), that is to say, (1) for the purchase of any land, or for the building of any buildings, which the parish council may lawfully purchase or build; (2) for any purpose authorized by such of the “adoptive Acts” above referred to as the parish council may have adopted; and (3) for any permanent work or other thing which the parish council may lawfully execute or do,—the parish council may (with the consent of the county council and of the Local Government Board) borrow money in like manner and subject to the like conditions as a local authority may borrow under the provisions of the Public Health Act, 1875, the loan being secured on the poor rate and on other the revenues of the parish council, and the power to borrow being limited to one-half of the assessable value for two years of the premises assessable within the parish.

The Act also provides (sect. 21), that urban sanitary authorities shall be called urban district councils (municipal corporations continuing their style or title unaltered), and that the district of each such urban authority shall be called an urban district; and that there shall be a rural district council for every rural sanitary district, and that

its district shall be called a rural district,—the term district council comprising each class of district council (whether urban or rural), and the term county district comprising every urban and also every rural district. And (by sect. 25) there are transferred to every rural district council all the powers, duties, and liabilities, as well of the rural sanitary authority in the district as also of the highway authority in the district,—a rural district council being, in this latter particular, placed on the same footing as an urban district council,—and (by sect. 26) every district council is charged with the protection of public rights of way, public rights of common, and public rights over road-side wastes ; and (by sect. 27) is charged with the licensing of gang-masters, dealers in game, passage brokers, emigrant runners, and the like. And the Act contains also the due provisions for meeting the expenses of the parish council (or parish meeting) and of the district council ; and provisions for gradually securing a uniformity of administration, the county council within every county district bringing (as nearly as can be) every parish within its district under one district council (sect. 36), and taking the due proceedings for such grouping or separating of parishes as shall be judged expedient (sect. 38), and for such dissolution of parish councils and creation of new parish councils as the decrease or increase of the population may render desirable (sect. 39). And, we may here observe, that the county council is charged generally, subject to an appeal to the High Court, with the supervision of the working of the Act ; and that council also intervenes for the removal of any occasional difficulties arising relative to the parish council (*u*).

By subsequent Acts, parish councils have been authorized

to contribute (or to further contribute) to any joint expenses incurred (jointly with any other council) in carrying out the provisions of the Burial Acts, 1852 to 1885 (*x*),—and also to any joint expenses incurred in connection with the provision (or use) of joint fire-engines (*y*)—or of better postal (including telegraph) facilities (*z*).

(*x*) 60 & 61 Vict. c. 40.

(*y*) 61 & 62 Vict. c. 38.

(*z*) 58 & 59 Vict. c. 18; 61 &
62 Vict. c. 18.

CHAPTER II.

OF THE LAWS RELATING TO THE POOR.

[BY the common law, as appears by the *Mirroure* (a), the poor were to be “sustained by parsons (rectors of the “church) and the parishioners, so that none of them should “die for default of sustenance” ; but no compulsory method for their relief or sustenance was provided until the reign of Hen. VIII. The monasteries undoubtedly supported a very numerous and idle poor, by a daily distribution of alms at their gates ; and upon their dissolution, divers statutes were made, in the reigns of King Henry the Eighth and his children, for providing for the poor and impotent, which, the preambles recite, had of late years then greatly increased.

These poor were principally of two sorts : Firstly, the sick and impotent, and who were therefore *unable* to work ; and, Secondly, the idle and sturdy, and who, although able, were *not willing* to work. To provide, in some measure, for both of these, in and about the metropolis, Edward the Sixth founded three royal hospitals : Christ’s and St. Thomas’s, for the relief of the impotent ; and Bridewell, for the punishment and employment of the vigorous and idle. And ultimately, after many other experiments, which were more or less effective, by the 43 Eliz. c. 2, (which is generally considered as the foundation of the modern poor law,) *overseers* of the poor were appointed in every parish ;] and it was provided, that the churchwardens of every parish should be the overseers ; and that

(a) Ch. 1, sect. 3.

there should likewise be appointed as overseers two, three, or four, but not more, of the inhabitants, being substantial householders, to be nominated yearly by two justices dwelling in or near the parish.

This Act of Elizabeth involved two principles ; first, that every poor person should be either relieved, or provided with work ; and secondly, that this should be done *parochially*, that is, out of funds to be raised and applied by parish officers within the limits of their respective parishes. It is to be understood, however, that it was not the policy of the law, to allow paupers to resort for *relief* indiscriminately to any parish they might prefer : for, by certain statutes of a date anterior to the Act of Elizabeth, persons unable or unwilling to work were compellable to remain in the particular parishes where they were *settled* (*b*) ; and subsequently to the Act of Elizabeth, able-bodied and industrious paupers were also confined or (in effect) confined to their existing places of *settlement*, the 14 Car. II. c. 12, s. 1, having (in substance) enacted, that persons newly coming to settle in any parish,—and likely to become chargeable,—might be *removed* by the warrant of two justices of the peace, on complaint of the parochial officers, to the parish where they were last legally settled (*c*). But inasmuch as the Act subjected the poor to removal from every place in which they were not settled to the place where they were settled, it had the indirect effect of attaching to a settlement the quality of a *right*, to wit, an exemption from removal ; and persons, who (for any reason) were desirous of gaining a settlement-right in particular parishes, were found to resort to them furtively, with the view of completing the forty days' residence therein (required by the 14 Car. II., c. 12)

(*b*) 19 Hen. 7, c. 12 ; 1 Edw. 6, c. 3 ; 3 & 4 Edw. 6, c. 16 ; 14 Eliz. c. 5 (*c*) *R. v. St. James*, 10 East 31.

before they were discovered (*d*). To prevent which, provision was afterwards made, that the forty days should be computed, only from the period when notice in writing of the new comer's abode was given to the parish officers, —such notice being dispensed with only in cases where the residence was attended with certain circumstances of notoriety, such as entering into a yearly service, or an apprenticeship (*e*) ; and although at a subsequent period the requisite of notice was abandoned (*f*), the requisite of notoriety remained. However, in the reign of George the Third (*g*), a man coming to settle in a parish ceased to be liable to removal, upon the mere *probability* of becoming chargeable, and must have become actually chargeable (by receiving or applying for relief) in order to become removable,—but in the meantime, the status of irremovability might have been acquired; and it became also established, that the right might be claimed *derivatively*, the child being entitled to the parent's settlement, and the wife to that of her husband.

In modern times, owing to the gradual increase of population and of paupers, various measures were from time to time devised by the legislature, for the improvement of the poor law system, and particularly for the improvement of the administration of poor law *relief*. Thus, by the 22 Geo. III. c. 83,—commonly called Gilbert's Act (*h*),—any parish was authorized, by consent of two third parts in number and value of the owners or occupiers, and with the approbation of two justices, to

(*d*) 1 Bl. Com. 362.

(*e*) *Ib.* ; 3 W. & M. c. 11.

(*f*) 35 Geo. 3, c. 101, s. 3.

(*g*) 35 Geo. 3, c. 101, s. 1 ; and see the prior statutes 8 & 9 Will. 3, c. 30 ; 9 Will. 3, c. 11 ; 12 Ann.

c. 18, s. 2 ; 3 Geo. 2, c. 29, ss. 8, 9.

(*h*) *Henderson v. Sherborne*, 2 M. & W. 239 ; *In re Whitechapel Union*, 6 Ad. & E. 49. Gilbert's Act is repealed by the Statute Law Revision Act, 1871.

appoint *guardians* to act in lieu of overseers, in all matters relative to the relief and management of the poor ; and also to enter into a voluntary union with one or more other parishes, for the more convenient accommodation, maintenance, and employment of their paupers in common ; and by the 59 Geo. III. c. 12,—commonly called “The Select Vestry Act,”—any parish, in vestry assembled, was enabled to commit the management of its poor to a committee of the parishioners called a *select vestry*, to whose orders the overseers were to conform (*i*). But these measures, though beneficial, were not sufficiently effective ; nor were they generally adopted ; and in the meantime, the evils resulting from the mismanagement of the poor continued to increase ; and these evils were aggravated by the injudicious administration of the poor laws, proceeding upon certain inherent defects in the then existing poor law system,—the duty of executing the poor law being, *e.g.*, left (in the case of each parish) to that parish individually,—whence resulted a great absence of uniformity in the different parishes in their poor law administration. Moreover, the size of most parishes was so limited as to expose them to great disadvantages, both with regard to the employment and to the relief of their poor,—the difficulty and expense of which are both obviously reduced, when the field of operation is wider and provision can be made on a larger scale. All which considerations induced parliament, in the year 1833, to issue a royal commission, to inquire into and report on the laws relating to the poor ; and in the following year, and upon the basis of the report of the commissioners, was passed the 4 & 5 Will. IV. c. 76, known as “The Poor Law Amendment Act, 1834,” and which, as supplemented by the divers statutes specified

(*i*) 59 Geo. 3, c. 12, so far as it the poor, is repealed by the
empowered parishes to establish Statute Law Revision Act, 1873.
select vestries for the concerns of

below (*k*), and as modified by the Local Government Acts, 1888 and 1894 (51 & 52 Vict. c. 41 and 56 & 57 Vict.

(*k*) 5 & 6 Will. 4, c. 69 (The Union and Parish Property Act, 1835); 2 & 3 Vict. c. 84 (The Poor Rate Act, 1839); 5 & 6 Vict. c. 18 (Parish Property and Parish Debts Act, 1842); 5 & 6 Vict. c. 57 (Poor Law Amendment Act, 1842); 7 & 8 Vict. c. 101 (Poor Law Amendment Act, 1844); 8 & 9 Vict. c. 117 (Poor Removal Act, 1845); 9 & 10 Vict. c. 66 (Poor Removal Act, 1846); 10 & 11 Vict. c. 33 (Poor Removal Act, 1847); 10 & 11 Vict. c. 109 (Poor Law Board Act, 1847); 11 & 12 Vict. c. 31 (Poor Law Procedure Act, 1848); c. 82; c. 91 (Poor Law Audit Act, 1848); c. 110 (Poor Law Amendment Act, 1848); c. 111; 12 & 13 Vict. c. 13 (Poor Relief Act, 1849); c. 103 (Poor Law Amendment Act, 1849); 13 & 14 Vict. c. 101 (Poor Law Amendment Act, 1850); 14 & 15 Vict. c. 105 (Poor Law Amendment Act, 1851); 20 Vict. c. 19 (Extra-parochial Places Act, 1857); 22 & 23 Vict. c. 49 (Poor Law (Payment of Debts) Act, 1859); 24 & 25 Vict. c. 55 (Poor Removal Act, 1861); c. 76 (Poor Removal (No. 2) Act, 1861); 25 & 26 Vict. c. 103 (Union Assessment Committee Act, 1862); 25 & 26 Vict. c. 113 (Poor Removal Act, 1862); 26 & 27 Vict. c. 89 (Poor Removal Act, 1863); 28 & 29 Vict. c. 79 (The Union Chargeability Act, 1865); 29 & 30 Vict. c. 113 (Poor Law Amendment Act, 1866); 30 & 31 Vict. c. 6 (The Metropolitan Poor Act, 1867, amended

by 34 Vict. c. 15, 60 & 61 Vict. c. 29, and 61 & 62 Vict. c. 45; c. 106); 31 & 32 Vict. c. 122 (Poor Law Amendment Act, 1868); 32 & 33 Vict. c. 41 (The Poor Rate Assessment and Collection Act, 1869, amended by 42 & 43 Vict. c. 10) (The Assessed Rates Act, 1879); 32 & 33 Vict. c. 45 (The Union Loans Act, 1869, amended by 42 & 43 Vict. c. 54, s. 13); 32 & 33 Vict. c. 63 (The Metropolitan Poor Amendment Act, 1869); 33 & 34 Vict. c. 2 (The Dissolved Boards of Management and Guardians Act, 1870); c. 18 (The Metropolitan Poor Amendment Act, 1870); c. 48 (The Paupers Conveyance Expenses Act, 1870); 34 & 35 Vict. c. 11 (The Poor Law Loans Act, 1871); c. 70 (The Local Government Board Act, 1871); c. 108 (The Pauper Inmates Discharge and Regulation Act, 1871); 35 & 36 Vict. c. 2 (The Poor Law Loans Act, 1872); 39 & 40 Vict. c. 61 (The Divided Parishes and Poor Law Amendment Act, 1876, amended by 42 & 43 Vict. c. 12); 42 & 43 Vict. c. 6 (The District Auditors Act, 1879); c. 54 (The Poor Law Act, 1879); 45 & 46 Vict. c. 20 (The Poor Rate Assessment Act, 1882); c. 58 (The Divided Parishes and Poor Law Amendment Act, 1882); c. 80; 46 & 47 Vict. c. 11 (The Poor Law Conferences Act, 1883); 48 & 49 Vict. c. 22 (The Public Health and Local Government Conferences Act, 1885); c. 46 (The Medical

c. 73), is the foundation [of the existing system of poor law relief.

By the 4 & 5 Will. IV. c. 76, the general management of the poor, and of the funds for their relief, throughout the country, was placed for a limited period under the superintendence and control of “The Poor Law Commissioners”; who had power to make such regulations as they thought proper for the guidance of the different parochial authorities, and who were aided in their operations by a certain number of assistant commissioners. This commission was superseded in the year 1847; and in lieu thereof, a board known as the “Poor Law Board” was established by the 10 & 11 Vict. c. 109; to which Board, all the powers and duties of the former poor law commissioners were transferred (*l*); and subsequently, all these powers and duties were assigned to (and they are now vested in) the “Local Government Board,” (established in the year 1871 by the 34 & 35 Vict. c. 70,) which consists of a president appointed by her Majesty, holding office during pleasure (*m*), together with (as *ex officio* members) the lord president of the privy council, all the secretaries of state, the lord privy seal, and the chancellor of the exchequer; and all *general poor law rules*—a term which extends to all rules intended to affect more than one union (*n*)—must be under the seal of this Board,—and signed by the president or one of the *ex officio* members of the Board, and countersigned by a secretary or assistant-secretary; and any such rules may be disallowed by her Majesty in

Relief Disqualification Removal Act, 1885); 59 & 60 Vict. c. 50 (The Poor Law Officers Superannuation Act, 1896, amended by the 60 & 61 Vict. c. 28); and 61 & 62 Vict. c. 19 (The Poor Law Unions Association, Expenses, Act, 1898).

(*l*) 10 & 11 Vict. c. 109, s. 10; 30 & 31 Vict. c. 106.

(*m*) Only the *president* and *one* of the secretaries may sit in the House of Commons at the same time. (10 & 11 Vict. c. 109, ss. 8, 9; 34 & 35 Vict. c. 70, s. 4.)

(*n*) 10 & 11 Vict. c. 109, s. 15.

council (*o*) ; or their validity may be questioned in the Queen's Bench Division (*p*) ; and once in every year, the Board submits to parliament a general report of its proceedings (*q*).

The Board was empowered to direct, that the relief of the poor in any parish should be administered by a board of guardians, to be elected by the owners of property and ratepayers in that parish, in such manner as in the Poor Law Acts set forth (*r*) ; and poor law inspectors were appointed for the purpose of visiting workhouses, and of being present at meetings of guardians, or other local meetings held for the relief of the poor (*s*) ; and the superintendence of the board was extended to poor persons lodged and maintained by contract, in any establishment, not being a lunatic asylum or workhouse nor under the effective control of any parochial or other local authority (*t*). Moreover, no parishes were for the future to be united, under Gilbert's Act, without the previous consent of the Board ; and the Board might also at its discretion consolidate two or more parishes into one *union*, under the government of a single board of guardians, to be elected by the owners and ratepayers of the component parishes (*u*), —the county justices resident in the union or parish being also *ex officio* guardians (*x*), and so continuing until 1894, when all *ex officio* guardians were abolished by the Local Government Act, 1891. Each of such "unions" was to

(*o*) 10 & 11 Vict. c. 109, s. 17.

(*p*) 4 & 5 Will. 4, c. 76, s. 105 ; 12 & 13 Vict. c. 103, s. 13 ; *Westbury-on-Severn Union Case*, 4 Ell. & Bl. 314 ; *Reg. v. Oldham Union*, 10 Q. B. 7000.

(*q*) 10 & Vict. c. 109, s. 13.

(*r*) 4 & 5 Will. 4, c. 76, ss. 39, 40 ; *Robinson v. Todmorden Union*, 3 Q. B. 675 ; 7 & 8 Vict. c. 101,

ss. 14—21 ; 14 & 15 Vict. c. 105, ss. 2, 3 ; 30 & 31 Vict. c. 106, ss. 4—10.

(*s*) 10 & 11 Vict. c. 109, ss. 18, 20.

(*t*) 12 & 13 Vict. c. 13.

(*u*) 4 & 5 Will. 4, c. 76, s. 38.

(*x*) 7 & 8 Vict. c. 101, s. 24 (now repealed by the Local Government Act, 1894 (56 & 57 Vict. c. 73)).

have a common workhouse, provided and maintained at the common expense of the component parishes ; and also a *common fund*, to which each component parish was to contribute (*a*) ; and on this fund was charged (by the 28 & 29 Vict. c. 79, s. 1) all the cost of the relief of the union poor, as well as certain other expenses incurred by the union board of guardians (*b*) ; and by the 42 & 43 Vict. c. 54, s. 8, provision was made for the combination of unions in certain cases (*c*). As regards the relief of the destitute poor *in the metropolis*, the cost thereof was distributed among the several unions, parishes, and places therein, under the superintendence of the Local Government Board (*d*). The provisions above summarized are (roughly speaking) the provisions now in force, with only such variations as have been introduced therein by the Local Government Acts, 1884 and 1894, of which some notice was taken in the preceding chapter, and which, so far as they relate to the poor law, will be specifically mentioned at the end of this present chapter.

The poor law system, as at present established, will be most conveniently dealt with, if we consider it, firstly, in connection with the settlement of the poor ; and secondly, in connection with the administration of poor law relief, and the assessment and collection of the poor rate.

(*a*) 24 & 25 Vict. c. 55, ss. 9—11 ; 28 & 29 Vict. c. 79, s. 12 ; 30 & 31 Vict. c. 106, s. 15.

(*b*) The other expenses referred to comprise the relief of destitute wayfarers (11 & 12 Vict. c. 110, s. 10 ; 12 & 13 Vict. c. 103, s. 2 ; 24 & 25 Vict. c. 55, s. 4) ; the burial of workhouse paupers (13 & 14 Vict. c. 101 ; 28 & 29 Vict. c. 79, s. 1) ; the relief of persons temporarily disabled by accident or sickness (11 & 12 Vict. c. 110, s. 2) ; the costs of pauper lunatics

(53 Vict. c. 5) ; and vaccination and registration expenses (28 & 29 Vict. c. 79, s. 1).

(*c*) On one occasion of great distress in the counties of Lancaster, Chester, and Derby, the poor law authorities were, by a temporary Act (25 & 26 Vict. c. 110), enabled to call on the unions of the county at large to contribute to the relief required in particular unions.

(*d*) 30 & 31 Vict. c. 6 ; 34 & 35 Vict. c. 70.

And, Firstly, as regards POOR LAW SETTLEMENTS :—A settlement may be acquired by birth, or by parentage, or by marriage, or by renting a tenement, or by being bound apprentice and inhabiting, or by estate, or by payment of taxes, or by residence. (1.) By *birth*,—for wherever a child is first known to be, that is always *primâ facie*, and until some other can be shown, the place of its settlement (*e*) ; but if its parents can be proved to have acquired a settlement, either by birth or otherwise, in another parish, then the *primâ facie* settlement of the child will be superseded by a derivative one, viz., the settlement by parentage, of which we are about to speak next (*f*) ; or if the parish or township in which the child was born is amalgamated with another parish or township or is divided under any Act of Parliament (*g*), the settlement by birth may be lost altogether (*h*). (2.) By *parentage*,—for a legitimate child takes the last settlement of its father, or of its widowed mother (as the case may be), till it attains the age of sixteen, and retains such settlement until it acquires another ; and a bastard child now retains the settlement of his mother until he gains another for himself (*i*). (3.) By *marriage*,—for a female may claim the settlement which belongs to her husband, and she retains that settlement after his death (*k*) ; but if her husband has no settlement, or if his settlement

(*e*) *Reg. v. Crediton*, 1 Ell. Bl. & F. 231 ; *Reg. v. All Saints, Derby*, 14 Q. B. 219.

(*f*) *R. v. Walthamstow*, 6 Ad. & Ell. 301 ; *Liverpool v. Portsea*, 12 Q. B. D. 302 ; *High Wycombe v. Marylebone*, 13 Q. B. D. 15 ; *Edmonton Union v. St. Mary, Islington*, 15 Q. B. D. 95 ; *Reigate Union v. Croydon Union*, 14 App. Ca. 465.

(*g*) 39 & 40 Vict. c. 61 ; 56 & 57 Vict. c. 73.

(*h*) *Reg. v. Tipton Inhabitants*, 3 Q. B. 215 ; *Dorking Union v. St. Saviour's Union*, [1898] 1 Q. B. 594.

(*i*) 39 & 40 Vict. c. 61, s. 35 ; *Westbury-on-Severn v. Barrow-in-Furness*, 3 Ex. D. 88 ; *Great Yarmouth v. City of London*, 3 Q. B. D. 232 ; *The Queen v. Bridgenorth Guardians*, 9 Q. B. D. 765 ; 11 Q. B. D. 314.

(*k*) 39 & 40 Vict. c. 61, s. 35.

is unknown, she retains that which belonged to her before her own marriage; and she cannot acquire one, in her own right, during the marriage (*l*). (4.) By *renting a tenement*; and for this it is requisite, that the tenement shall be a separate and distinct tenement, and that the party shall have *bonâ fide* rented the same at and for the sum of 10*l.* a year at the least for the term of one whole year; and the party must have occupied the tenement and paid the rent for the term of one whole year at the least, and must (for the same period) have been assessed to and have paid the poor rate in respect thereof, and must have resided in the parish or township for forty days (*m*). (5.) By being *bound apprentice* (*n*), and *inhabiting* for forty days under such binding;—the apprentice gains a settlement in the parish in which he inhabits, which need not necessarily be the parish in which the service takes place (*o*); but no settlement can be acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas, as a fisherman or otherwise (*p*); and the indenture of apprenticeship must in all cases have been executed by the apprentice, except in the case of one bound by the parish (*q*). (6.) By *estate*,—for a settlement is gained, of a temporary kind, in any parish, by

(*l*) *Medway Union v. Bedminster Union*, 14 App. Cas. 465.

(*m*) 6 Geo. 4, c. 57, s. 2; 1 Will. 4, c. 18, s. 1; 4 & 5 Will. 4, c. 76, s. 66; *R. v. Kibworth Harcourt*, 7 Barn. & Cress. 790; *R. v. Halifax*, 4 Ell. & Bl. 647; *R. v. Snape*, 6 A. & E. 278; *Overseers of Willesden v. Paddington*, 3 Best & Smith, 593; *The Queen v. Exeter*, Law Rep., 4 Q. B. 341; *Hastings Union v. St. James, Clerkenwell*, L. R. 1 Q. B. 38.

(*n*) *R. v. Billingham*, 5 A. & E.

676; *R. v. Barton-upon-Irwell*, 3 Best & Smith, 604; *St. Pancras v. Clapham*, 2 Ell. & Ell. 742.

(*o*) *Rex v. Burton Bradstock*, Burr. S. C. 531; *Rex v. Brotton*, 4 B. & Ald. 84.

(*p*) 4 & 5 Will. 4, c. 76, s. 67; *R. v. Maidstone*, 5 A. & E. 326.

(*q*) 4 & 5 Will. 4, c. 76, s. 15; 7 & 8 Vict. c. 101, s. 12; and the Merchant Shipping Act, 1894; (57 & 58 Vict. c. 60), ss. 106, 107.

having *an estate of one's own* there, of whatever value, and whether the interest be legal or equitable (*r*), and by residing in the parish for forty days (*s*),—a species of settlement which appears to be founded on the principle of the common law, that a man shall not be removed from his own property (*t*) ; but no person may retain a settlement so gained for any longer time than he inhabits within ten miles of the parish (*u*) ; and in case he ceases to inhabit within that distance, and afterwards becomes chargeable, he is liable to be removed to the parish in which he was settled previously to such inhabitancy, or else to the parish (if any) in which he has gained a settlement since the inhabitancy (*x*). (7.) By *payment of parochial taxes*,—for a settlement may be gained by being *charged to and paying the public taxes, and levies of the parish* (*y*),—provided (by 35 Geo. III. c. 101, s. 4), the tenement is of the yearly value of 10*l.*; and provided (by 6 Geo. IV. c. 57, s. 2) the tenement (not being the person's own property) is a separate and distinct tenement, *bonâ fide* rented by him for 10*l.* a year at the least, for the term of one whole year, and occupied for a year at least (*z*). And (8.) By *residence*,—for a settlement may also be acquired by *residing for the term of three years in a parish* in such manner and under such circumstances in

(*r*) *R. v. Ardleigh*, 7 A. & E. 70; *The Queen v. Belford*, 3 B. & Smith, 662; *Reg. v. Thornton*, 2 Ell. & Ell. 788.

(*s*) *Ryslip v. Harrow*, 2 Salk. 524.

(*t*) 2 Nolan, 58.

(*u*) *The Queen v. Saffron Walden*, 9 Q. B. 76.

(*x*) 4 & 5 Will. 4, c. 76, s. 68; *Reg. v. St. Giles-in-the-Fields*, 2 Q. B. 446; *R. v. Hendon*, 2 Q. B. 455.

(*y*) 3 W. & M. c. 11, s. 6; 6 Geo. 4, c. 57, s. 2; 1 Will. 4, c. 18, s. 1; 4 & 5 Will. 4, c. 76, s. 66; *R. v. St. Giles*, 7 Ell. & Bl. 205; *Everton v. South Stoneham*, 2 Ell. & Ell. 771; *St. George's, Hanover Square v. Cambridge Union*, Law Rep., 3 Q. B. 1.

(*z*) *Reg. v. Westbury-on-Trim*, 7 E. & B. 444; *St. George's, Hanover Square v. Cambridge Union*, L. R. 3 Q. B. 1.

each of such years as would render him *irremovable* (a). And here it may be desirable to observe, that before the 14th August, 1834,—the date of the passing of the Poor Law Amendment Act, 1834,—settlements could be acquired by residence, accompanied with other circumstances of notoriety, viz., 1. By hiring and service,—which was where a person, being unmarried and childless, was hired for a year, and served a year in the same service ; and 2. By executing any public annual office or charge within the parish for one whole year ; but these modes of acquiring a settlement were abolished by sect. 64 of that Act.

And it is to be observed generally, that when (by any of the modes above enumerated) a person has gained a settlement in any parish, he is considered as settled there until he acquires a new one in some other place ; but the later acquisition supersedes the earlier. And all those who stand in need of relief, and apply for it, are entitled to be relieved in the parish (or union) in which they happen to be, or to which, as it is commonly expressed, they are *chargeable* ; for if settled there, they constitute its *settled* poor, and if not settled there, they are termed its *casual* poor (b). The parish is, however, exonerated from this burthen, if there is anyone competent and by law compellable to maintain the pauper ; and those who are so compellable comprise the wife and husband, the father and grandfather, the mother and grandmother, or the legitimate (c) children of the pauper (d),—a husband

(a) 39 & 40 Vict. c. 61, s. 34 ;
The Queen v. Brampton Union, 3
 Q. B. D. 479 ; *The Queen v. Maid-*
stone Union, 5 Q. B. D. 31 ; *Dor-*
chester Union v. Weymouth Union,
 16 Q. B. D. 31 ; *St. Olave's Union*
v. Canterbury Union, [1897] 1
 Q. B. 682.

(b) 33 Geo. 3, c. 35, s. 3 ; *R. v.*
St. Pancras, 7 A. & E. 750.

(c) *City of Westminster v. Ger-*
rard, 2 Bulst. 346.

(d) 43 Eliz. c. 2, s. 7 ; 31 &
 32 Vict. c. 122, ss. 33, 36 ;
 33 & 34 Vict. c. 93, s. 13 ; and
 45 & 46 Vict. c. 75, s. 21.

being also liable by 4 & 5 Will. IV. c. 76, ss. 56, 57, to maintain his wife's children born before his marriage with her, until the children attain sixteen years of age or their mother sooner dies. The measure or extent of this liability is prescribed by (and is at the rate assessed by) an order of the justices at their general quarter, or petty sessions (*e*) ; and on refusal to obey such order, the sums so assessed are recoverable before a court of summary jurisdiction as a civil debt,—*i.e.*, they may be levied by distress and sale of the goods and chattels of the person liable; and in default of distress, if it be proved that such person had means to pay since the order and has not paid, he may be committed to prison for contempt (*f*). And the better to secure the performance of this duty, it is provided by 5 Geo. I. c. 8, that where any person shall run away from his place of abode, leaving his wife or children chargeable as paupers,—his goods, or any annual profits of his lands, may be seized under the warrant or order of two justices, and (if such warrant or order be confirmed by the sessions) may be applied towards the maintenance of such wife or children ; and it is further provided by 5 Geo. IV. c. 83, s. 4, that persons running away and leaving their wives or children so chargeable, shall be deemed *rogues and vagabonds*, and shall be liable to imprisonment for any time not exceeding three calendar months ; and (by sect. 3) that persons wholly or in part able to maintain themselves or families by work or other means, but refusing or neglecting so to do, whereby they become so chargeable, shall be deemed *idle and disorderly persons*, and may be summarily convicted, and imprisoned in the house of correction with hard labour, for any time not exceeding one calendar month (*g*).

(*e*) 59 Geo. 3, c. 12, s. 26.

(*f*) 31 & 32 Vict. c. 122, s. 36 ;
42 & 43 Vict. c. 49, ss. 6, 35.

(*g*) *Reeve v. Yeates*, 1 H. & C.

435 ; *Horley v. Rogers*, 2 Ell. & Ell. 674. Note.—Only *male* persons are intended (see *Peters v. Cowie*, 2 Q. B. D. 131).

If there are no relations to whom recourse can be had, the *settled poor* must be relieved by the poor-law authorities of the union or parish, so long as their necessity continues; and if they are able to work and refuse to do so, they may be committed to prison (*h*). On the other hand, with respect to the casual poor, they may, in general, be removed in the manner to be presently described; and they are entitled to relief only till such removal can be effected, and are in the meantime subject to the provisions of the 34 & 35 Vict. c. 108, and the Casual Poor Act, 1882 (45 & 46 Vict. c. 36), regulating their treatment in the casual wards and in the workhouses of the parish or union. Moreover, all casuals born in Scotland or Ireland, the Isle of Man, Scilly, Jersey, or Guernsey, and who have no settlement in England,—may, upon complaint of any guardian, relieving officer, or overseer, be removed by the order and warrant of two justices of the peace, or (in a proper case) of a stipendiary or metropolitan police magistrate (*i*), to the place of their birth, together with their families,—that is, with their wives and children, or such of them as are chargeable and have as yet acquired no settlement in their own right (*k*); and casuals who have a known place of settlement in England (wherever born) may be removed, by the like order and warrant, to the place of such settlement, together with their families (*l*); the removal order being in either case obtained, upon complaint of the parish (or union) to which the paupers have become chargeable (*m*),—the

(*h*) 43 Eliz. c. 2, s. 4; 55 Geo. 3, c. 137, s. 5; 7 & 8 Vict. c. 101, ss. 57, 58.

(*i*) 8 & 9 Vict. c. 117; 24 & 25 Vict. c. 76; 25 & 26 Vict. c. 113; 26 & 27 Vict. c. 89.

(*k*) *Reg. v. St. Anne, Blackfriars*, 2 Ell. & Bl. 440.

(*l*) 9 & 10 Vict. c. 66; 11 & 12 Vict. c. 31; 12 & 13 Vict. c. 103, s. 3; 14 & 15 Vict. c. 105, s. 13; 24 & 25 Vict. c. 76; 28 & 29 Vict. c. 79, s. 2; 33 & 34 Vict. c. 48.

(*m*) 13 & 14 Car. 2, c. 12, s. 1; 28 & 29 Vict. c. 79, s. 2.

chargeability being proved by the certificate of the guardians (*n*) ; and notice in writing of the order, accompanied by a statement in writing of the ground of the removal, must be sent to the parish (or union) on which it is made (*o*). If the order is submitted to, or if no notice of appeal is given within twenty-one days, the pauper is to be removed accordingly ; but if such notice is given within that period, the pauper is to be kept where he has become chargeable, until the appeal (if duly prosecuted) shall have been determined (*p*) ; and such appeal is to the court of quarter sessions having jurisdiction in the place from which the removal is directed (*q*) ; and the court may order the parish (or union) against which the appeal shall be decided to pay reasonable costs to the other (*r*) ; and where the respondents succeed, such costs will include the relief and maintenance of the pauper from the time of the notice of the order of removal (*s*). In the event of some doubtful point of law arising, the justices may make their order on the appeal subject to a *special case* ; or the parties, at any time after notice of appeal has been given, by consent, and by order of a judge of the High Court, may state the facts in a special case, for the opinion of the High Court, and agree to have judgment entered at the sessions in conformity with the opinion of the High Court (*t*). Also, if the party decided against is dissatisfied with the order made at sessions, a writ of

(*n*) 7 & 8 Vict. c. 101, s. 69, and 11 & 12 Vict. c. 110, s. 11.

(*o*) 4 & 5 Will. 4, c. 76, s. 79 ; 11 & 12 Vict. c. 31, ss. 2, 3, 4 ; *Reg. v. Yorkshire*, 1 Ell. Bl. & Ell. 713 ; *Reg. v. Ruyton*, 1 Best & Smith, 534.

(*p*) 4 & 5 Will. 4, c. 76, ss. 79, 80, 81, 83 ; *R. v. Kent*, 6 B. & C. 639 ; *R. v. Leominster*, 2 B. & Smith, 391.

(*q*) 14 Car. 2, c. 12, s. 2 ; 8 & 9 Will. 3, c. 30, s. 6 ; 11 & 12 Vict. c. 31 ; *The Queen v. Sussex*, 4 B. & S. 966.

(*r*) 4 & 5 Will. 4, c. 76, s. 82 ; 11 & 12 Vict. c. 31, s. 5 ; 12 & 13 Vict. c. 45, ss. 4, 5.

(*s*) 4 & 5 Will. 4, c. 76, s. 84.

(*t*) 12 & 13 Vict. c. 45, s. 11.

certiorari may be issued in certain cases from the Queen's Bench Division to remove the proceedings into the High Court ; and the case is then argued there, and the order of sessions is then either affirmed or quashed, according to the law on the facts given in evidence at the sessions (*u*).

If a casual has no known place of settlement in England, and was not born in Scotland, Ireland, or other part of the United Kingdom, then he must remain of necessity in the place where he has become chargeable ; and he may claim relief there, so long as he continues to be in want, upon the same footing with its settled poor,—unless and until some place be afterwards discovered wherein he may claim a settlement. There are also some particular cases in which the removal of a casual pauper to his or her place of settlement or birth is illegal ; for the wife of such a pauper cannot, if her husband has no settlement, be removed to her place of maiden settlement, so as to separate her from her husband, unless by mutual consent (*x*) ; nor can a child (whether legitimate or otherwise) be taken away from its mother during its time of nurture,—that is, until the age of seven years (*y*) ; and even though an order of removal be duly made, still if the pauper, by reason of sickness or infirmity, is not in a fit state to travel, the execution of the order must be suspended, till the justices are satisfied that it may be safely executed (*z*),—such suspension extending also to any others of the pauper's family included in the removal order (*a*) ; also, persons in legal custody cannot be removed, under

(*u*) 11 & 12 Vict. c. 31, s. 7.

(*x*) *R. v. Eltham*, 5 East, 113 ;
R. v. St. Mary, Beccrley, 1 B. &
Ad. 201.

(*y*) *R. v. Birmingham*, 5 Q. B.
210 ; *Re Ethel Brown*, 13 Q. B. D.
614.

(*z*) 35 Geo. 3, c. 101, s. 2 ; 49
Geo. 3, c. 124, s. 3 ; *The Queen v.*
Llanllechid, 2 Ell. & Ell. 530 ; 24 &
25 Vict. c. 76 ; 25 & 26 Vict. c. 113 ;
and 30 & 31 Vict. c. 106, s. 26.

(*a*) 49 Geo. 3, c. 124, s. 3.

the poor laws, from the parish where they are confined. And it is to be remembered, that, in general, no person may now be removed from a parish (or union) in which he has resided for *one whole year* (*b*) (formerly *five*, then *three* whole years, and now *one whole year*) (*c*), next before the application for a warrant for his removal,—such period of residence sufficing to ensure his irremovability, although it should not confer on him a settlement (*d*); and further, a pauper may not be removed for becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices shall state in the warrant that they are satisfied that the sickness or accident will produce permanent disability (*e*); and a woman residing with her husband at the time of his death cannot be removed till twelve calendar months afterwards, if she shall so long continue his widow (*f*); nor a woman deserted by her husband, if after the desertion she reside for one year

(*b*) 28 & 29 Vict. c. 79, s. 8; *Machynlleth v. Pool*, Law Rep., 4 Q. B. 592; *The Queen v. St. Olave's*, L. R. 9 Q. B. 38.

(*c*) 24 & 25 Vict. c. 55, s. 4; 9 & 10 Vict. c. 66; 11 & 12 Vict. c. 111.

(*d*) By 9 & 10 Vict. c. 66, s. 1, any time passed in prison (*The Queen v. Potterhamworth*, 1 E. & E. 262); or in military or naval service (*The Queen v. East Stonehouse*, 4 Ell. & Bl. 901; *Easton v. St. Mary, Marlborough*, Law Rep., 2 Q. B. 128); or as an in-pensioner in Greenwich or Chelsea Hospitals; or in confinement in a lunatic asylum; or as patient in a hospital (*St. Olave's Union v. Canterbury Union*, [1897] 1 Q. B. 682); or during which parochial relief shall have been received (*The Queen v. St. George's, Bloomsbury*, 4 B. & Smith, 108), is to be excluded from the computation; and so

also the time during which any person is detained under the Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19, s. 32), or in a school under the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118, s. 31), must be excluded from such computation. As to an interruption of the residence, see 12 & 13 Vict. c. 103, s. 4; *R. v. Stapleton*, 1 E. & B. 766; *Wellington v. Whitechurch*, 4 B. & Smith, 100; *The Queen v. St. Leonard's, Shoreditch*, L. R. 1 Q. B. 21; *Reg. v. Glossop*, *ib.* 227; *Reg. v. Whibly*, L. R. 5 Q. B. 325; *Reg. v. Abingdon*, *ib.* 406; *Reg. v. St. Ives*, L. R. 7 Q. B. 467; *Reg. v. Worcester Union*, L. R. 9 Q. B. 340.

(*e*) 9 & 10 Vict. c. 66, s. 4; *The Queen v. St. George's, Middlesex*, 2 B. & Smith, 317.

(*f*) 9 & 10 Vict. c. 66, s. 2; *Reg. v. Cudham*, 1 E. & E. 409.

(formerly three years) in such a manner as would, if she were a widow, render her irremovable (*g*) ; and a child under the age of sixteen, whether legitimate or illegitimate, residing with his or her father or mother, stepfather or stepmother, or reputed father, may not be removed, unless the person with whom such child is residing may lawfully be removed (*h*).

Secondly, as regards the ADMINISTRATION OF THE POOR LAW, AND THE ASSESSMENT (AND COLLECTION) OF THE POOR RATE.—The duty of administering *relief*, where a parish is under the government of guardians, or of a select vestry, belongs to those authorities, according to the provisions of the Acts (including the Local Government Act, 1894, to be presently mentioned) under which they have been respectively appointed, and subject to the superintendence of the Local Government Board. Liverpool, however, is the only place where the poor law is now administered by a select vestry ; fifteen other parishes or places are, for poor law purposes, managed by authorities established under local Acts (*i*) ; and all other parishes are now managed by separate boards of guardians, or else form part of some union managed by a board of guardians for the union. Also, with some very rare exceptions, there are now no extra-parochial places for civil purposes ; for all places which before 1857 were extra-parochial were to be deemed parishes of themselves for civil purposes, and power was given to appoint overseers for such places (*k*) ; and all such places for which in 1868 no overseer had been appointed, or for which no overseer

(*g*) 24 & 25 Vict. c. 55, s. 3 ; *The Queen v. St. Mary, Islington*, Law Rep., 5 Q. B. 445 ; *The Queen v. St. George's-in-the-East*, Law Rep., 5 Q. B. 364 ; *Reg. v. Cookham*, 9 Q. B. D. 522.

(*h*) 9 & 10 Vict. c. 66, s. 3 ; 24 & 25 Vict. c. 55, s. 2 ; *The Queen v.*

St. Mary Arches, Exeter, 1 B. & Smith, 890 ; *Mitford Union v. Wayland Union*, 25 Q. B. D. 164.

(*i*) 7 & 8 Vict. c. 101, ss. 64, 65 ; 11 & 12 Vict. c. 91, s. 12 ; and 30 & 31 Vict. c. 106, s. 2.

(*k*) 20 Vict. c. 17, s. 1.

was then acting, were for all civil parochial purposes incorporated with the next adjoining parish (*l*).

In all cases of *sudden and urgent necessity* arising in a parish under the government of guardians or of a select vestry, any overseer is empowered and required by law, whether the applicant for relief is settled in the parish or not, to give him or her such necessary temporary relief as the case may require; and if the overseer refuses to give such necessary relief, and the pauper is not settled or usually resident in the parish to which the overseer belongs, any justice of the peace may, by an order under his hand or seal, direct such necessary relief to be given, the overseer who disobeys such order incurring a penalty not exceeding 5*l.* (*m*); and whatever may be the settlement or residence of the pauper, any justice of the peace is empowered to order *medical* relief in all cases of sudden and dangerous illness, the overseer here also being subject to the penalty of 5*l.*, in case of disobedience (*n*). Also, in unions formed under the Poor Law Amendment Acts, any two justices of the peace usually acting for the district may, at their discretion, order any adult person, who is unable to work and is entitled to relief, to be relieved, if he desires it, without residing in the workhouse; but in such a case, one of the justices must certify, of his own knowledge, that the person is unable to work (*o*). And it is now made lawful for the guardians to permit, at their discretion, a husband and wife admitted into a workhouse to live together, provided either of them shall be infirm, sick, or disabled by any injury, or shall be above the age of sixty years; but every such case must be reported forthwith to the Local Government Board (*p*).

(*l*) 31 & 32 Vict. c. 122, s. 27.

(*m*) 4 & 5 Will. 4, c. 76, s. 54; and see *Att.-Gen. v. Merthyr Tydfil* (1899), W. N. 38, for the powers of guardians to grant relief to able-bodied persons in cases of sudden or urgent necessity.

(*n*) *Rex v. Kerr*, 5 T. R. 159.

(*o*) 4 & 5 Will. 4, c. 76, s. 27; 11 & 12 Vict. c. 91, s. 12; 57 & 58 Vict. c. 25.

(*p*) 10 & 11 Vict. c. 109, s. 23; 39 & 40 Vict. c. 61, s. 10.

The duty of making and levying the poor rate or parochial fund for the relief of the poor belonged, and subject (as regards rural parishes) to the provisions of the Local Government Act, 1894, still belongs, to the churchwardens and overseers of the parish (*q*); and the concurrence of the inhabitants at large was not, and is not, necessary (*r*). And for the better execution of these duties, the statutes authorize the appointment of *collectors and assistant overseers* for the parish or (it may be) for the separate townships therein (*s*). And here it is convenient to observe, that the office of overseer is, in general, compulsory, excepting in the cases of the persons enumerated in the foot-note below (*t*); and a woman may fill the office (*u*); and the appointment of overseers, and also of assistant overseers, is now (in the case of rural parishes) vested in the parish council, or (as the case may be) in the parish meeting, provided for by the Local Government Act, 1894 (*v*). In urban parishes, however, they are still appointed by two justices of the peace, unless an order has been made by the Local Government Board authorizing the council or other representative body in the borough or urban district to appoint or act as overseers, and to appoint assistant overseers (*x*).

(*q*) As to the recovery of poor rates and other local taxes, see 43 Eliz. c. 2, ss. 12, 13; 12 & 13 Vict. c. 14; 25 & 26 Vict. c. 82.

(*r*) 43 Eliz. c. 2, s. 1; 7 & 8 Vict. c. 101, s. 63.

(*s*) 2 & 3 Vict. c. 84; 7 & 8 Vict. c. 101, ss. 61, 62; 29 & 30 Vict. c. 113, s. 10; 56 & 57 Vict. c. 73; *R. v. Yorkshire*, 6 A. & E. 863; *R. v. Watts*, 7 A. & E. 461; *The Queen v. Greene*, 17 Q. B. 793; *Worth v. Newton*, 10 Exch. 247; *Smart v. West Ham Union*, 11 Exch. 867.

(*t*) Peers and members of par-

liament; justices of the peace; aldermen of London; clergymen; dissenting ministers; practising barristers and solicitors; registered medical practitioners and dentists; officers of the courts of law, of the army and navy, and of the customs and excise; inspectors under the Factory Acts; and registrars of births, deaths and marriages (Archbold's Poor Law, 15th ed. p. 137).

(*u*) *R. v. Stubbs*, 2 T. R. 395; 56 & 57 Vict. c. 73, s. 20.

(*v*) 56 & 57 Vict. c. 73, s. 5.

(*x*) *Ibid.* s. 33 (1).

The poor rate is raised prospectively (*y*); and for some given portion (usually one half part) of the year; and at so much in the pound, according to the parochial assessment; and upon a scale adapted to the probable exigencies of the parish (*z*). And by the 43 Eliz. c. 2, it is directed to be raised by taxation of every “*occupier* of lands, houses, “*tithes impropriate, propriations of tithes* (*a*), coal mines, “*or saleable underwoods*” in the parish; and a man is rateable for all that he *occupies* (*b*) in the parish, whether he is resident there or not,—for example, in respect of a *box* at a theatre (*c*), or in respect of *moorings* in the river (*d*), or in respect of *hoardings* used for advertising (*e*), or in respect of a tunnel, sewer, and the like; and corporate property (*e.g.*, the railroad of a railway company) is deemed for this purpose to be in the occupation of the corporation (*f*); but crown property (*g*) is exempt; also, county courts (*h*); and (by specific enactments) certain other properties are exempt, *e.g.*, (by the 3 & 4 Will. IV. c. 30,) all churches and chapels; and (by the 32 & 33 Vict. c. 40,) the rating authority may at their discretion exempt (*i*) Sunday schools and ragged schools; but this exemption does not extend to elementary schools generally (*k*), although

(*y*) *R. v. Gloucester*, 5 T. R. 346.

(*z*) 1 Nolan, 61, 62.

(*a*) *R. v. Barker*, 6 A. & E. 388; *Re Hackney Rent Charges*, 1 Ell. Bl. & Ell. 1.

(*b*) *R. v. Ponsonby*, 3 Q. B. 14; *The Mersey Docks Case*, 11 House of Lords Cases, 443.

(*c*) *Reg. v. St. Martin*, 3 Q. B. 294.

(*d*) *Cory v. Bristow*, 1 C. P. D. 54.

(*e*) 52 & 53 Vict. c. 27.

(*f*) 4 & 5 Vict. c. 48; *R. v. York*, 6 A. & E. 419; *Re Oxford Poor Rate*, 8 Ell. & Bl. 184; *South Eastern Railway Company v.*

Dorking, 3 Ell. & Bl. 491; *Pimlico Tramway Company v. Greenwich*, Law Rep., 9 Q. B. 9; *Société Telegraphe v. Penzance Union*, 12 Q. B. D. 552.

(*g*) *Queen v. Stewart*, 8 Ell. & Bl. 360; *Martin v. West Derby Union*, 11 Q. B. D. 145.

(*h*) *Queen v. Manchester*, 3 Ell. & Bl. 336.

(*i*) *Bell v. Crane*, L. R. 8 Q. B. 481.

(*k*) *West Bromwich School Board v. West Bromwich Overseers*, 13 Q. B. D. 929; *Reg. v. London School Board*, 17 Q. B. D. 738.

it extends to voluntary schools, which are absolutely exempt (*l*). The Act of Elizabeth was (after a long period of exemption) extended also, by the Rating Act, 1874 (*m*), to land used for a plantation or wood, or for the growth of saleable underwood; and to rights of shooting and fishing; and to mines of every kind (other than the coal mines which were already rateable); and underwoods are now rateable under this Act, and not under the Act of Elizabeth. And here we shall observe, that, in general, the tenant (and not the landlord) is considered as the occupier within the statute (*n*); but if the hereditament be let for a term *not exceeding three months*, the occupier is entitled, under the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 1, to deduct the amount paid by him, in respect of poor rate, from the rent due to the owner; and (by sects. 3 and 4 of the same Act) where the yearly rateable value of a dwelling-house does not exceed 8*l*. (or in the Metropolis 20*l*., in Liverpool 13*l*., or in Manchester or Birmingham 10*l*.), the owner may agree or be ordered to be rated instead of the occupier (*o*),—a provision so convenient for the collection of the rate, that it has been adopted also in connection with, *e.g.*, the highway rate (*p*).

The 43 Eliz. c. 2 further directed the poor rate to be raised, by the taxation of “every *inhabitant*, parson, vicar, and other” of the parish; and as an “inhabitant,” a man was formerly liable to be rated according to his apparent ability, that is, according to the value of the stock in trade, and other local and visible personal property, he had within the parish, and of which he made profit (*q*):

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| (<i>l</i>) 60 & 61 Vict. c. 5, s. 3. | (<i>o</i>) <i>Iles v. West Ham Union</i> , |
| (<i>m</i>) 37 & 38 Vict. c. 54; | 8 Q. B. D. 69; 8 App. Ca. 386. |
| <i>Crawshaw v. Morgan</i> , Law Rep., | (<i>p</i>) 45 & 46 Vict. c. 27. |
| 5 E. & I. App. 304; <i>Chaloner v.</i> | (<i>q</i>) <i>R. v. Lumsden</i> , 1 W. W. & |
| <i>Bolckow</i> , 3 App. Cas. 933. | H. 587. |
| (<i>n</i>) <i>R. v. Welbank</i> , 4 M. & S. 222. | |

but this liability to taxation, in respect of inhabitancy, on the profits of a man's stock in trade and other his personal property, was taken away by the 3 & 4 Vict. c. 89.

By the 6 & 7 Will. IV. c. 96, no poor rate was to be of any force which should not be made on an estimate of the net annual value of the several hereditaments rated,—that is to say, the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant rates and taxes, and tithe commutation rentcharge (if any), but deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any) necessary to maintain the premises in a state to command such rent. And that statute prescribed also in what form the rate should be made, and what particulars it should comprise (*r*); and required that the parish officers should sign a declaration at the end, to the effect that the particulars therein were true and correct as far as they had been able to ascertain them by their best endeavours; and these provisions, subject to an alteration in the form of declaration by the overseers of parishes in which a valuation list under the Union Assessment Committee Act, 1862, is in force (*s*), are substantially the provisions now applicable to the assessment of the poor rate. But, by the 25 & 26 Vict. c. 103 and 27 & 28 Vict. c. 39, further provisions have been made, for securing (by a fresh valuation where required) the uniform and correct assessment of all rateable hereditaments,—that is to say, of the rateable hereditaments comprised within all unions formed (*t*), and also (by adoption) within unions not formed, under the

(*r*) *The Queen v. Eastern Counties Railway Company*, 5 Ell. & Bl. 974.

(*s*) 25 & 26 Vict. c. 103, Sched.; 27 & 28 Vict. c. 39, s. 11.

(*t*) *The Queen v. Justices of Kent*, Law Rep., 6 Q. B. 132.

Poor Law Amendment Acts ; and a like provision is also now applicable to the metropolis (*u*).

By the 43 Eliz. c. 2, s. 1, no rate is to be valid, unless it is allowed by two justices ; and by the 17 Geo. II. c. 3, as amended by the 1 Vict. c. 45, s. 2, public notice thereof is to be given at the parish church, on the Sunday next after the same had been so allowed (*x*), or, if there is no church in the parish, notice of the rate must be given by affixing such notice in some public and conspicuous place in the parish (*y*). The allowance by the justices was, however, held to be a mere matter of form (*z*) ; and, after allowance and publication, any person aggrieved by the rate, and having reasonable objection to it as irregular or unequal, may, after giving to the assessment committee notice of objection to the valuation list (*a*), appeal against it to the next practicable quarter sessions of the peace having jurisdiction in the place for which it was made ; and such appeals still lie to these sessions, under the express provisions of the Local Government Act, 1888 (*b*). Rating appeals may also, in cases of irregularity, unfairness, or incorrectness in valuation of premises, be preferred under the 6 & 7 Will. IV. c. 96, to the justices in petty sessions ; who are, by the last-mentioned Act, required to hold, four times at least in every year, a special sessions for hearing poor rate appeals within their respective divisions (*c*) ; and the decision of the justices in such special sessions is conclusive,—unless the parties impugning their decision shall, within fourteen days, give notice of appeal therefrom to the next general sessions or quarter sessions of the

(*u*) 32 & 33 Vict. c. 67.

(*x*) 1 Vict. c. 45 ; *Ormerod v. Chadwick*, 16 Mee. & W. 367 ; *Burnley v. Methley Overseers*, 1 E. & E. 789.

(*y*) 45 & 46 Vict. c. 20, s. 4.

(*z*) *R. v. Dorchester (Justices)*, Str. 393.

(*a*) 27 & 28 Vict. c. 39, s. 1.

(*b*) 51 & 52 Vict. c. 41, s. 8.

(*c*) 6 & 7 Will. 4, c. 96, s. 6 ; 27 & 28 Vict. c. 39 ; *The Queen v. Denbighshire*, 15 Q. B. D. 451.

peace. And the justices in general sessions, or at quarter sessions, have power to affirm, quash, or amend the rate ; or, if it become necessary to set the whole aside, may order the overseers to make a new rate (*d*) ; and they have authority also to award costs to the successful party (*e*) : and they may state a special case for the opinion of the Queen's Bench Division. Justices who are ratepayers of a parish, the rate for which is appealed against, cannot vote upon the appeal (*f*) ; but they are not disqualified by reason of their being ratepayers of some other parish in the union than that for which the rate appealed against is made (*g*). Judges of the High Court are not in any case now disqualified from hearing appeals to the High Court by reason of their being ratepayers of the parishes concerned (*h*).

It is the duty of the overseers, and of all persons having the collection, receipt, or distribution of the poor rate, to render to the proper auditors, once in every half-year, (and oftener if required by the Local Government Board,) an account of all moneys received and expended, and to verify the same on oath if required (*i*) ; and they are not to make any profit by their office (*k*) ; and all balances remaining from time to time in the hands of the parish officers may be recovered from them (if necessary) by a summary proceeding before two justices of the peace (*l*) ; and the overseers are bound also, in all cases, to render an account at the end of their year of office (*m*).

(*d*) 17 Geo. 2, c. 38, s. 6 ;
41 Geo. 3, c. 23 ; 6 & 7 Will. 4,
c. 96, s. 6.

(*e*) 17 Geo. 2, c. 38, s. 4.

(*f*) 16 Geo. 2, c. 18, s. 3.

(*g*) 27 & 28 Vict. c. 39, s. 6.

(*h*) 40 & 41 Vict. c. 11, ss. 1, 3.

(*i*) 42 & 43 Vict. c. 6.

(*k*) 4 & 5 Will. 4, c. 76, s. 77 ;
Henderson v. Sherbourne, 2 Mee. &
W. 236.

(*l*) 1 & 2 Will. 4, c. 60 ; 4 &
5 Will. 4, c. 76, ss. 47, 99 ;
2 & 3 Vict. c. 84 ; 7 & 8 Vict.
c. 101, ss. 32—38 ; *R. v. St.*
Marylebone, 5 Ad. & El. 268.

(*m*) 4 & 5 Will. 4, c. 76, s. 47.

Such is a general outline of the law relating to the poor : and for the minuter provisions of that law (relative, *e.g.*, to the provision of sites for workhouses, and to the temporary housing of the poor ; and relative to their burial, their emigration, and the like) (*n*).—the student must consult the various Poor Law Acts themselves and the treatises upon Rating in general ; and we will here only add, that *local rates* are, in general, levied upon the same assessment, and by the same officers, as the *poor's rate* ; and the *county rate* is also now raised through the poor law officials (*o*). It will be remembered, however, that, by the Local Government Act, 1894 (56 & 57 Vict. c. 73), as mentioned at the end of the preceding chapter, provision has been made for the constitution of parish councils and parish meetings in all rural parishes throughout England and Wales ; and under that Act (sect. 20), there are now no *ex officio* guardians of the poor,—either in rural parishes or in any other parishes,—all poor law guardians being now made elective, and the electors being the duly registered parishioners. The election also of the *overseers*, and of the *assistant-overseers*, in all rural parishes, is by that Act entrusted to the parish council (sect. 5), or (when the parish has no council) to the parish meeting (sect. 19) ; and the churchwardens, as such, have ceased to be overseers (sect. 5),—the powers, duties, and liabilities of the churchwardens, and also of the vestry of the parish, so far as they relate to the poor law, being, by the Local Government Act, 1894, transferred to the parish council (sect. 6), or (as the case may be) to the parish meeting (sect. 19),—besides divers other specific powers, relating to matters

(*n*) 4 & 5 Will. 4, c. 76 ; 5 & 6 Will. 4, c. 69 ; 5 & 6 Vict. c. 18 ; 7 & 8 Vict. c. 101 ; 11 & 12 Vict. c. 110 ; 12 & 13 Vict. c. 103 ; 13 & 14 Vict. c. 101 ; 14 & 15 Vict. c. 105 ; 18 & 19 Vict. cc. 79, 105, 119 ; 20 & 21 Vict. c. 13 ; 24 & 25 Vict. c. 55 ; 29 & 30 Vict. c. 113 ; 34 & 35 Vict. c. 70 ; 48 & 49 Vict. c. 52.
 (*o*) 37 & 38 Vict. c. 54, s. 10.

which are only remotely connected with the poor laws, and including the matter of allotments and small holdings, and divers matters affecting the public health. And the Act contains also provisions for extending (under an order and orders of the Local Government Board) to municipal boroughs generally (including county boroughs or any other urban district) (sect. 33), the powers which by the Act are vested in the parish councils of rural parishes relative to the appointment of overseers and assistant overseers, besides other powers relative to the poor law; and these last mentioned provisions are made applicable also to the administrative county of London (sections 33 and 34) (*p*).

(*p*) *Vide supra*, pp. 43—49.

CHAPTER III.

OF THE LAWS RELATING TO CHARITIES—SAVINGS BANKS —
FRIENDLY AND OTHER SOCIETIES.

WE will next consider the laws relating respectively to charities, savings banks, and friendly and other kindred societies,—all of which have, for their paramount object, the aid or relief of poverty.

I. CHARITIES.—These have been always much favoured by the law (*a*) ; for “no time,” as Lord Coke observes, “was so barbarous as to abolish learning, or so uncharitable as to prohibit relieving the poor ” (*b*). Wherefore, when by the 23 Hen. VIII. c. 10 (*c*), gifts to *superstitious* uses were made void, gifts for *charitable* purposes were held not to fall within the provisions of the statute ; and by the 39 Eliz. c. 5, any person was enabled, by deed enrolled in Chancery, to found a hospital and to give it a corporate existence, with capacity to take and purchase goods and chattels, lands and tenements,—and this without the king’s licence in mortmain, and subject only to these conditions, that the lands were *freehold*, in fee simple, of the clear annual value of 10*l.*, and not exceeding 200*l.* in annual value. And by the Statute of Charitable Uses (43 Eliz. c. 4), the lord chancellor was empowered to award commissions, to inquire of all gifts to such uses, and of all abuses and breaches of trust relative thereto, and to make orders for the future management of the

(*a*) Bac. Ab. Ch. Uses, E.

(*b*) *Porters’ Case*, 1 Rep. 26.

(*c*) 37 Hen. 8, c. 4 ; 1 Edw. 6, c. 14.

charity funds (*d*) ; but the universities and cathedrals, and all colleges, hospitals, and free schools, having special visitors or governors, were excepted from this provision (*e*).

Some abuses, however, being found to attend the power of disposing of lands *by will* for charitable purposes, therefore, by the 9 Geo. II. c. 36, it was enacted, that no lands or hereditaments, or money to be laid out in the purchase thereof, should be given or conveyed, or anyways charged or encumbered, in trust for or for the benefit of any charitable uses,—unless by such conveyance *inter vivos*, and under such conditions as the Act specified ; and which conditions need not here be further referred to, as we had occasion to consider this statute, and certain recent enactments of it, in a former volume (*f*) ; and it will suffice to say, that there is now practically no restraint whatsoever, on gifts of lands by *will* for charitable purposes,—and pure personal estate always might (and of course still may) be bequeathed for these purposes.

Commissions under the 43 Eliz. c. 4, to redress abuses in charities, have been long disused, their place being supplied by remedies of a simpler character ; for, independently of any statute, the king, as *parens patrie*, has, and (through his chancellor) (*g*) exercises, a general superintendence over all charities not otherwise sufficiently protected ; also, wherever necessary, the king's attorney-general, at the relation of some informant (who is called the *relator*), may institute proceedings in Chancery, in his official capacity, to have the charity established, or to have the charity funds duly administered (*h*) ; and it is not essential that the relators should be the persons principally

(*d*) 1 Bac. Ab. Ch. Uses, F. ; 3 Bl. Com. 436 ; 2 Vern. 118.

(*e*) *Collison's Case*, Hobb. 136.

(*f*) *Vide sup.* vol. 1. pp. 320, 322, 323 *et seq.*

(*g*) 3 Bl. Com. 427.

(*h*) 3 Bl. Com. 428 ; *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 118 ; *Caldwell v. Pagham Harbour Reclamation Company*, 2 Ch. D. 221.

interested,—for any persons (though the most remote of those who fall within the contemplation of the charity) may be relators (*i*). Also, by the 52 Geo. III. c. 101 (commonly called Sir Samuel Romilly's Act), in every case of the breach of any charitable trust, or wherever the direction of the court is necessary for the administration of such trust, any two or more persons may, on obtaining the previous sanction of the attorney or solicitor-general, apply for relief by *petition*, to be heard and disposed of in a summary way; and under the Charitable Trusts Acts hereinafter referred to, and under the general jurisdiction of the court as regulated by the orders and rules of 1883, divers summary applications for the due administration of charitable trusts are made competent.

By the 52 Geo. III. c. 102, provision was made for the registration of charitable donations,—in order to prevent their benefits from being lost; and the Act directed, as regards all then existing charities, that a memorial stating the funds and objects thereof, the names of the founders (when known), the persons having the custody of the title deeds of the endowment, and the trustees or possessors of the estates, should be registered with the clerk of the peace of the county or town, and a duplicate of such memorial transmitted to Chancery; and the Act further directed, as regards all future charities, that the like memorial should be registered within twelve months after the decease of the donor; but donations not secured on land or permanently invested in the funds, and donations the management of which was left to the discretion of trustees, were (with many other particular cases) excepted from the Act; and the registration of such charitable gifts is part of the business which, by the Local Government Act, 1888 (*k*), s. 3, has now been

(*i*) *Attorney-General v. Bucknall*,
2 Atk. 328.

(*k*) 51 & 52 Vict. c. 41.

transferred to the county councils established by that Act, and the clerk of the peace is made the clerk of such council.

The protection of charitable endowments was also otherwise secured, by a variety of statutes passed previously to the present reign (*l*) ; but these need not here be particularly examined ; for, by a group of Victorian statutes known as “The Charitable Trusts Acts” 1853 to 1887 (*m*), a Board of Commissioners (called the “Charity Commissioners for England and Wales”) has been established, with power to examine into all charities, and to prosecute all due inquiries by its officers (including Assistant Commissioners, formerly called Inspectors); and with powers also to require charity trustees and others, to render to the Board written accounts and statements, or to attend and be examined on oath, in relation to any charity or its property ;—to authorize actions and proceedings concerning the same ;—to sanction building

(*l*) See 58 Geo. 3, c. 21, and 59 Geo. 3, cc. 81, 91 (which authorized the appointment of commissioners to inquire into endowed charities, and to certify to the Attorney-General such cases as they found to require the interference of equity) ; 1 & 2 Geo. 4, c. 92 (which empowered trustees of charity lands to exchange them in certain cases for others) ; 3 Geo. 4, c. 72, s. 11 (which authorized the apportionment of the charitable endowments of any parish divided under the Church Building Acts) ; 9 Geo. 4, c. 85 (which quieted the titles of lands purchased for charitable purposes) ; 1 & 2 Will. 4, c. 60, s. 30 (which directed lists of the charitable endowments of the parish to be made by the vestries

adopting that Act) ; 2 Will. 4, c. 57, s. 3 (which provided for the supply of new trustees, where the original trustees of a charity were dead and the representative of the last survivor could not be found) ; 4 & 5 Will. 4, c. 76, s. 74 (which empowered the Local Government Board to require from trustees for the poor, a true account in writing of the particulars of their trust) ; and 56 & 57 Vict. c. 73, s. 14 (as to public charities, other than ecclesiastical charities, in rural parishes).

(*m*) 16 & 17 Vict. c. 137 ; 18 & 19 Vict. c. 124 ; 23 & 24 Vict. c. 136 ; 25 & 26 Vict. c. 112 ; 32 & 33 Vict. c. 110 ; and 50 & 51 Vict. c. 49.

leases, repairs, and improvements, and sales and exchanges of charity lands ;—to frame and to approve new schemes, and (in cases of difficulty) to certify to parliament, for the approval of parliament, any such new schemes, for the better management of charities (*n*) ;—and to permit a great variety of other acts to be done in relation to charities, such as the varying circumstances of each case may from time to time require (*o*). And by one of these Acts (25 & 26 Vict. c. 112), the Board may (subject to certain restrictions) appoint or remove any charity trustees, or any schoolmaster or schoolmistress, or other officer of the charity ; but this branch of their jurisdiction is not to be exercised,—except on the application of the majority of the trustees,—where the gross annual income of the charity amounts to 50*l.* or upwards ; and no trustee is to be removed on the ground only of his religious belief (sect. 4) ; and the Board is not to exercise jurisdiction, in any case which by reason of its contentious character, or of any special question of law or fact which is involved therein, they may consider more fit to be dealt with by the court (sect. 5),—the court here referred to being the Court of Chancery, where the gross annual income of the charity exceeds 50*l.* ; and being the county court for the district having jurisdiction in bankruptcy, where the gross annual income only reaches to or falls below that sum (*p*) ; and an appeal, by way of petition, lies from the orders of the Commissioners to the Court of Chancery (*q*).

The Charitable Trusts Acts also authorize the appointment of corporate bodies, called “ The Official Trustees of Charity Lands,” and “ The Official Trustees of Charitable Funds,” in whom respectively the lands, stocks, securities,

(*n*) 16 & 17 Vict. c. 137, ss. 54,
60 ; 24 & 25 Vict. c. 32.

(*o*) 21 & 22 Vict. c. 71.

(*p*) 16 & 17 Vict. c. 137, s. 36 ;
23 & 24 Vict. c. 136, s. 11.

(*q*) 23 & 24 Vict. c. 136, s. 8, and
32 & 33 Vict. c. 110, ss. 10, 11.

and moneys of charities may from time to time become or be vested by order of the court (*r*) ; and the Commissioners may order these corporations respectively to convey the land, or to assign and pay over the stocks, securities, and moneys, as they shall think expedient (*s*). And although, by the 22 & 23 Vict. c. 50, charities or institutions *exclusively for the benefit of Roman Catholics* were for some time exempt from the jurisdiction of the Charity Commissioners, these charities are now, to a certain extent, subject to that jurisdiction,—the 23 & 24 Vict. c. 134 having enacted, that (in cases where an estate is given on trust for the exclusive benefit of Roman Catholics, but is invalidated by reason of certain of the trusts being of the class deemed superstitious or otherwise illegal) such estate or its income shall be apportioned in Chancery, or by the Charity Commissioners, and a fixed proportion thereof shall be declared subject to the lawful trusts, and the residue subject to such trust for the benefit of persons professing the Roman Catholic religion, as the court or board may, under the circumstances, consider just ; and a scheme for giving effect to such apportionment may be established. Also, by the 46 & 47 Vict. c. 36 (the City of London Parochial Charities Act, 1883), the Charity Commissioners have been entrusted (subject to the regulation of the High Court) with the management and disposition of the parochial charities within the City ; and under the 56 & 57 Vict. c. 73 (the Local Government Act, 1894), the Charity Commissioners exercise a controlling power over the charities of rural parishes, the management of which has by that Act been vested in the parish councils created thereby.

A great number of cases, however, are exempted from the operation of the Charitable Trusts Acts ; for these

(*r*) 16 & 17 Vict. c. 137, ss. 48, (*s*) 18 & 19 Vict. c. 124, s. 37 ;
53 ; 18 & 19 Vict. c. 124, s. 15, &c. 50 & 51 Vict. c. 49.

Acts extend not to (among other charities) the universities of Oxford, Cambridge, London, or Durham, or to any college or hall in those universities ; or to any cathedral or collegiate church (*t*) ; or to the colleges of Eton and Winchester (*u*) ; but as regards “ Prison Charities ” within the Prison Charities Act, 1882 (*x*), these are only partially exempt from the jurisdiction of the charity commissioners ; and any of the excepted charities may petition the Board to have the benefit of the above enactments allowed to them ; and any charities whatever may refer to the Board any questions or disputes arising between or among their members, touching or concerning the management of the charity (*y*).

Some account having now been given of the legislative enactments relating to charities, we will next advert to certain general principles which may be collected from the judicial decisions in regard to charitable donations, trusts, and endowments. And Firstly, all trustees of charities may be called to account in Chancery for the funds committed to their charge ; and new trustees, (where circumstances so require,) may be appointed (*z*) ; improvident alienations of charitable estates may be rescinded ; schemes for carrying properly into effect the intentions of the donor, or (where the case calls for such interference) for varying his intentions in the manner hereinafter explained, may be established ; and in fact every species of relief may be afforded, which it is in the nature of such institutions to require. But in the case of corporations endowed for charitable purposes, the management is usually vested in

(*t*) 16 & 17 Vict. c. 137, s. 62.

(*u*) 18 & 19 Vict. c. 124, ss. 47—49.

(*x*) 45 & 46 Vict. c. 65.

(*y*) 16 & 17 Vict. c. 137, ss. 63, 64 ; 18 & 19 Vict. c. 124, s. 46.

(*z*) Such new trustees may also

(without the aid of the court) be appointed under the Trustees Appointment Acts, 1850 to 1890 (13 & 14 Vict. c. 28 ; 32 & 33 Vict. c. 26 ; and 53 & 54 Vict. c. 19),—in the case of all trusts for religious or educational purposes.

governors, subject to a controlling or visitatorial power in the founder and his heirs, or in such persons as the founder shall appoint (*a*) ; and with the proceedings of such functionaries the law does not in general interfere, unless they have also the management of the revenues, and are found to be abusing their trust (*b*). It is to be observed, however, that when the king is the founder of an eleemosynary lay corporation, the visitatorial power is vested in the crown, and is committed by royal authority to the Lord Chancellor ; who may thus be called upon to redress abuses properly falling within the province of a visitor ; but the jurisdiction belongs to him in his personal character only, as representative of the crown, and not as a judge in Chancery (*c*). And here it may be convenient to observe, that the Local Government Act, 1894 (56 & 57 Vict. c. 73), transfers to and vests in the parish council of every rural parish all the charitable property (not being church property) theretofore vested in the overseers, or in the churchwardens and overseers, of the parish (sect. 5) ; and enables the parish council to acquire further endowments for the parish (sect. 8), and to deal therewith, subject to the control of the Local Government Board or of the Charity Commissioners (sects. 8, 14).

Secondly, with regard to the nature of charitable trusts, we may remark, that the word *charitable* is to be understood in a very large sense ; for not only gifts for the benefit of the poor are included, but also all endowments for the advancement of learning (*d*), as well as institutions for the advancement of science and art, and for any other useful and public purpose falling within the charitable uses

(*a*) *Eden v. Forster*, 2 P. Wms. 326 ; *R. v. Governors of Darlington Free Schools*, 6 Q. B. 682.

(*b*) *Berkhampstead Free Schools*, 2 V. & B. 138 ; *Attorney-General v. Talbot*, 3 Atk. 673.

(*c*) Co. Litt. 96 a ; *Ex parte Dann*, 9 Ves. 547 ; *R. v. St. Catherine's Hall*, 4 T. R. 233.

(*d*) *Attorney-General v. Whorwood*, 1 Ves. sen. 537.

enumerated in the preamble to the 43 Eliz. c. 4 (as such preamble is repeated in sect. 13 of the 51 & 52 Vict. c. 42), or falling within the meaning and intendment of such preamble (*e*) ; and the term comprises also donations for pious or religious objects,—all objects being considered as religious which tend to the benefit either of the Established Church of England, or of any body of Dissenters sanctioned by law (*f*) ; and trusts for the maintenance of the Roman Catholic worship (subject always to the law against uses deemed superstitious) are also now placed on a similar footing (*g*). And though a trust for the advancement of the Jewish religion, as well as of any other faith hostile to Christianity, was at one time held illegal, and as such was excluded from the protection of Chancery (*h*),—it has been now provided, by the 9 & 10 Vict. c. 59, s. 2, and the 18 & 19 Vict. c. 86, s. 2, that her Majesty's subjects professing the Jewish religion shall be liable, in respect of their schools, places for religious worship, education, and other charitable purposes, and the property held therewith, to the same laws as those to which her Majesty's Protestant subjects dissenting from the Church of England are liable, and to no other (*i*). But the definition of charitable trusts, although thus wide, does not extend to include gifts of a strictly private character ; for if a sum of money be bequeathed with a direction to apply it “to such purposes of benevolence and liberality as the executors shall approve,” or even “in private charity,” no charitable trust will be created,—*scilicet*, no such trust as will be

(*e*) *Attorney-General v. Heelis*, 3 Sim. & Stu. 67 ; *Trustees of British Museum v. White*, *ib.* 594 ; *Howse v. Chapman*, 4 Ves. 551.

(*f*) *Attorney-General v. Pearson*, 3 Meriv. 409 ; *Attorney-General v. Cock*, 2 Ves. sen. 273.

(*g*) 2 & 3 Will. 4, c. 115 ; 18 & 19 Vict. c. 86, s. 2 ; 23 & 24 Vict. c. 134.

(*h*) *In re Masters, &c. of the Bedford Charity*, 2 Swanst. 487 ; 1 Dickens, 258.

(*i*) *Vide sup.* vol. II. p. 626.

taken cognizance of in Chancery ; but the property will, in such cases, belong to the next of kin, free from the direction (*k*). On the other hand, where a gift is for a purpose clearly falling within the description of charity, though expressed in the most general and indefinite terms, the trust will never be allowed to fail on account of its uncertainty ; but the law will provide for it some particular mode of application ; and sometimes the sovereign himself, by his chancellor or other great officer, but more usually the Court of Chancery, directs the disposition in such a case (*l*).

For it is a rule, with respect to all charities, that the intention of the donor, so far as it is practicable and legal, shall be strictly observed ; the law not permitting it to be varied without necessity, even by consent of his heirs (*m*) ; but where such intention is incapable of being literally acted upon, or its literal performance would be unreasonable, a decree will be made for its execution *cy-près*,—that is, in some method conformable to the general object, and adhering as closely as possible to the specific design, of the donor (*n*). For example, where a sum of money was bequeathed to trustees, to be distributed among the inhabitants of several specified parishes, in money, provisions, physic, or clothes, as the trustees should think fit, and the fund ultimately became too large to be suitably confined to those objects,—the court directed it to be applied to the further objects of instructing and apprenticing the children of those parishes to benefit which the

(*k*) *Morice v. Bishop of Durham*, 10 Ves. 522 ; *In re Sutton, Stone v. Att.-Gen.*, 28 Ch. Div. 464.

(*l*) Bac. Ab., Ch. Uses.

(*m*) *Att.-Gen. v. The Margaret and Regius Professors in Cambridge*, 1 Vern. 55.

(*n*) *Att.-Gen. v. The Ironmongers' Company*, 2 Mylne & Keene, 576 ; *New v. Bonaker*, Law Rep., 4 Eq. Ca. 655 ; *Chamberlain v. Brockett*, *ib.* 8 Ch. App. 206 ; *In re Clarke's Trusts*, 1 Ch. D. 497.

charity was designed (*o*); and on a somewhat similar principle, as to meeting-houses founded for dissenters, it was declared, by the 7 & 8 Vict. c. 45 (sometimes called “Lord Lyndhurst’s Act,” and sometimes “The Dissenter’s Chapels Act”), that, where no particular religious doctrines or mode of worship should have been prescribed by the deed or instrument of trust, the usage of the congregation for twenty-five years should be taken as conclusive evidence of the doctrines and worship to be observed or practised therein (*p*).

Lastly, we may remark, that, though among the civilians a legacy to pious or charitable uses was entitled to a preference over other bequests in a will, it is not so by our law, which directs that in the case of a deficiency of assets, the charitable legacies shall abate *pro rata* with the others (*q*); but the testator himself may give the charitable legacies a priority over all other legacies (*r*).

II. SAVINGS BANKS.—These are institutions devised for the safe custody and increase of the small savings of the industrious poor; and when regulated according to Act of Parliament, certain benefits and protections are afforded to them by the law (*s*). The earlier statutes which regulated the constitution (and defined the powers

(*o*) *Att.-Gen. v. Whitchurch*, 3 Ves. 141; *Bishop of Hereford v. Adams*, 7 Ves. 324; *Att.-Gen. v. Bovill*, 1 Phill. 762; *Att.-Gen. v. Mansfield*, 14 Sim. 601; *In re Campden Charities*, 18 Ch. D. 310.

(*p*) *Att.-Gen. v. Bunce*, Law Rep., 6 Eq. Ca. p. 563.

(*q*) *Bac. Ab.*, Ch. Uses, E.

(*r*) *Miles v. Harrison*, Law Rep., 9 Ch. App. 316; *Ravenscroft v. Workman*, 37 Ch. D. 637.

(*s*) Savings banks are provided by the 22 & 23 Vict. c. 20, and 26 & 27 Vict. c. 12, for non-commissioned officers and soldiers in the army; and by the 57 & 58 Vict. c. 60 (ss. 145—154), repealing (but re-enacting the provisions of) 17 & 18 Vict. c. 104, s. 180; 18 & 19 Vict. c. 91, s. 17; 19 & 20 Vict. c. 41; and 29 & 30 Vict. c. 43, for seamen in the navy, and in the mercantile marine.

and privileges) of these banks, were principally the 9 Geo. IV. c. 92 ; 5 & 6 Will. IV. c. 57 ; and 7 & 8 Vict. c. 83,—under which earlier statutes, many such banks were established, and some of them still exist ; but the earlier statutes were repealed, and their provisions with amendments re-enacted, by the 26 & 27 Vict. c. 87 (The Savings Bank Acts Amendment Act, 1863) ; and the law on this subject is now contained in the last mentioned Act, as amended by the Acts specified in the foot-note (*t*).

Institutions thus sanctioned consist of banks for the receipt of small deposits of money, the produce of which is to accumulate at compound interest, and the principal and interest are to be paid out to the depositors, as required, deducting only the necessary expenses of management ; the deposits from a single depositor are not to exceed 50*l.* (formerly 30*l.*) in the whole, in any one savings bank year (*u*) ; and no fresh deposit is to be received from him, when the sum (inclusive of interest) amounts to 200*l.* (formerly 150*l.*) (*x*) ; and where the sum standing in the name of any depositor exceeds 200*l.* (principal and interest included), interest is to be for the future allowed on 200*l.* only (part thereof), and not on the excess (*y*) ; moreover, all sums in excess of 200*l.* are to be invested (unless the depositor otherwise directs) in government stock (*z*) ; and the whole amount of such stock credited to the account of the depositor is never at any one time to exceed 500*l.* stock (*a*) : and not more than 200*l.* stock is to be credited to his account in any one savings bank year (*b*).

(*t*) 29 & 30 Vict. c. 5 ; 32 & 33 Vict. c. 59 ; 39 & 40 Vict. c. 52 ; 43 & 44 Vict. c. 36 ; 44 & 45 Vict. c. 55 ; 46 & 47 Vict. cc. 47, 54 ; 47 & 48 Vict. cc. 2, 23 ; 50 & 51 Vict. cc. 40 47 ; 54 & 55 Vict. c. 21 ; and 56 & 57 Vict. c. 69.

(*u*) 26 & 27 Vict. c. 87, s. 39 ; 56 & 57 Vict. c. 69, s. 1.

(*x*) 54 & 55 Vict. c. 21, s. 11.

(*y*) *Ibid.*

(*z*) 56 & 57 Vict. c. 69, s. 3.

(*a*) *Ibid.* s. 2.

(*b*) *Ibid.*

The management of savings banks is vested in trustees (whence also these banks are commonly described as Trustee Savings Banks, to distinguish them from the Post Office Savings Banks to be presently mentioned); and these trustees must be prohibited (by the rules of the bank) from receiving (directly or indirectly) any benefit from a deposit made in the bank; and they are required to remit the money deposited (with the exception of what is retained in the hands of the treasurer to answer exigencies) to the Bank of England (*c*), to an account kept in the names of the National Debt Commissioners, and denominated “The Fund for the Banks for Savings”; and interest at the rate of 3*l.* per cent. (formerly 3*l.* 5*s.* per cent.) per annum is payable on this account to the trustees (*d*), the interest payable to depositors themselves being limited to 2*l.* 15*s.* per cent. (formerly 3*l.* 0*s.* 10*d.*) per annum (*e*). Various provisions have also been made, to secure the proper management of savings banks (an inspection committee having been appointed for their regulation by the 54 & 55 Vict. c. 21); and other provisions have also been made, to save unnecessary expense and inconvenience to the members of these institutions,—*e.g.*, in the case of the decease of a depositor whose estate does not exceed 50*l.*, no legacy duty attaches, and no stamp duty is payable for probate or administration (*f*); and if a depositor dies having a deposit not exceeding 100*l.* (*g*) (formerly 50*l.*) exclusive of interest, and no will or letters of administration are produced within one month afterwards, the money may be paid to such person or persons as shall appear to the trustees or managers to be the widow, or entitled thereto under the Statutes of Distributions, or according to the rules of the bank (*h*); and

(*c*) 26 & 27 Vict. c. 87, s. 15.

(*d*) 43 & 44 Vict. c. 36, s. 2.

(*e*) 26 & 27 Vict. c. 87, s. 23;

43 & 44 Vict. c. 36, s. 2.

(*f*) 26 & 27 Vict. c. 87, ss. 41, 42.

(*g*) 46 & 47 Vict. c. 47, s. 5;

50 & 51 Vict. c. 40, s. 3.

(*h*) 26 & 27 Vict. c. 87, s. 43.

upon the same principle, deposits by or on behalf of a minor may be paid to such minor himself (*i*). Also, all deposits made by a married woman were to be paid to such woman herself, unless her husband gave notice of the marriage, and required payment thereof to be made to him (*k*); but now, under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 6,—repealing and re-enacting a corresponding provision in the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 2, any deposit in a savings bank, made after the 9th August, 1870, in the name of a married woman, or in the name of a woman who shall marry after such deposit, shall be deemed her separate property and shall be accounted for and paid over to her as if she were an unmarried woman. And upon the same principle of convenience and economy, the Savings Bank Acts have provided, that all disputes between the institution and any of its members or their representatives shall be referred to the arbitrator appointed by the Acts for that purpose; and under the Savings Bank (Barrister) Act, 1876 (39 & 40 Vict. c. 52), the arbitrator, in the case of all such disputes, is now the Registrar of Friendly Societies (*l*).

Any persons forming themselves into a society for the purpose of establishing a savings bank, are entitled to claim for it the benefit of these parliamentary provisions,—upon causing their rules and regulations to be entered in a book, to be kept by one of its officers for the inspection of depositors. It was requisite, however, that such rules and regulations should have been certified by the barrister appointed for that purpose (*m*); and these rules and regulations must still be certified as being in conformity with law and with the Savings Bank Acts; and the

(*i*) 26 & 27 Vict. c. 87, s. 30.

Norwich Savings Bank, 9 Ad. & E. 729.

(*k*) Sect. 31.

(*l*) *R. v. Mildenhall Savings Bank*, 6 Ad. & E. 952; *R. v.*

(*m*) 26 & 27 Vict. c. 87, s. 4.

Registrar of Friendly Societies is now the barrister appointed for that purpose (*n*). Moreover, the formation of any savings bank established after the 28th July, 1863, must be sanctioned by the treasury (*o*); and, in some respects, all savings banks are subject to the control of the treasury (*p*); but it is not lawful for any trustee savings bank to purport (by its name or otherwise), that the government is responsible or liable to its depositors for the moneys deposited (*q*); and every such bank is now required to describe itself as a “savings bank certified under the Act of 1863” (*r*),—whence many of these banks have latterly registered themselves under the Companies Acts, 1862—1898, and have (strictly speaking) ceased to be savings banks.

The institution of savings banks having been found to be deserving of encouragement, although only under proper regulations, it was thought expedient to establish a species of savings bank which should be managed by the authorities of the Post Office, and which should enjoy the advantage of the direct security of the government for the repayment of its deposits; and this species of savings bank (called a Post Office Savings Bank) has accordingly been established, under the provisions of the 24 & 25 Vict. c. 14 (usually cited as the Post Office Savings Bank Act, 1861) (*s*). That Act authorizes the post-master general, with the consent of the treasury, to cause his officers to receive deposits, in all towns in which a branch office for that purpose is appointed, for remittance to the principal office; and to repay the same, under such regulations as shall

(*n*) 39 & 40 Vict. c. 52, s. 2.

(*o*) 26 & 27 Vict. c. 87, s. 2.

(*p*) 39 & 40 Vict. c. 52, s. 2;
50 & 51 Vict. c. 40.

(*q*) 54 & 55 Vict. c. 21, s. 1.

(*r*) *Ibid.*

(*s*) This statute has been since amended by the 26 & 27 Vict. c. 14; 37 & 38 Vict. c. 73; 43 & 44 Vict. c. 36; 44 & 45 Vict. c. 20; 50 & 51 Vict. c. 40; and 56 & 57 Vict. c. 69.

from time to time be prescribed (*t*) ; and each depositor is to receive from the post-master general, through the branch office at which the deposit is made, an acknowledgment of its amount, which shall be conclusive evidence of his claim to repayment within ten days after demand, with interest thereon at the rate of 2*l.* 10*s.* per cent. per annum (*u*). The moneys deposited are to be forthwith paid over to the National Debt Commissioners (*x*), to be by them invested in such securities as are lawful for the funds of other savings banks (*y*) ; and if at any time the funds so created shall be insufficient to meet the lawful claims of all depositors, the treasury is empowered to make such deficiency good out of the consolidated fund (*z*). And the Act further enacts, that the accounts, both of the post-master general and of the commissioners, in respect of all moneys deposited with or invested by them respectively under the Act, shall be audited by the comptroller general of the exchequer and auditor general of the public accounts (*a*) ; and that an account of all deposits received and paid during the current year shall be submitted to both houses of parliament (*b*). The Act contains also provisions enabling any person, who has made a deposit under it, to transfer the amount to any trustee savings bank ; and for the transfer, on the other hand, of the amount due to any depositor in any trustee savings bank, to any post office savings bank (*c*).

And in connection with these institutions, it may be here noticed, that, by the 16 & 17 Vict. c. 45 (as amended by the 27 & 28 Vict. c. 43, 45 & 46 Vict. c. 51, and 50 & 51 Vict. c. 40, s. 9), the National Debt Commissioners

(*t*) 24 & 25 Vict. c. 14, s. 1.

(*u*) Sects. 2, 3, 7.

(*x*) Sect. 5.

(*y*) Sect. 9.

(*z*) Sect. 6.

(*a*) Sect. 13 ; 29 & 30 Vict. c. 39,

s. 5 ; 43 & 44 Vict. c. 36 ; and
45 & 46 Vict. c. 51.

(*b*) 24 & 25 Vict. c. 14, s. 12 ;
37 & 38 Vict. c. 73, s. 3.

(*c*) 24 & 25 Vict. c. 14, s. 10 ;

26 & 27 Vict. c. 14.

may grant to any depositor in any savings bank, or other person whom they shall think entitled to be regarded as a depositor, an *immediate* or *deferred* life annuity depending on a single life ; or an *immediate* annuity depending on joint lives with benefit of survivorship, or depending on the joint continuance of two lives ; or a sum (not exceeding 100*l.*) to be paid on the death of any person,—such annuities and insurances respectively being placed under the sole management of the officers of *Post Office* savings banks.

The Acts relating respectively to trustee savings banks and to post office savings banks have much in common, and the regulations made or sanctioned by the treasury thereunder present also much similarity ; and the labour of distinguishing accurately between the provisions and regulations respectively applicable to each is comparatively as useless as it would be tedious ; and such labour has latterly been (or will shortly be) saved altogether, in consequence of the provision of the Savings Bank Act, 1887 (50 & 51 Vict. c. 40), ss. 1, 2, whereby the regulations applicable to either may (by order of the treasury) be made applicable also to the other. Moreover, a trustee savings bank is now placed (as regards the integrity of its management) as effectively under the control of the treasury as any post office savings bank necessarily is,—provision having been made, by the Trustee Savings Bank Act, 1887 (50 & 51 Vict. c. 47), for the appointment by the High Court of Justice (on the application of the treasury) of a commissioner to examine into the state of the affairs of any trustee savings bank, on any *primâ facie* case made for such an examination (*d*) ; and by the 54 & 55 Vict. c. 21, s. 2, inspectors of savings banks have also latterly been appointed. Also, in a proper case, such a savings bank may be ordered to be wound up, as an

(*d*) 50 & 51 Vict. c. 47, s. 2.

unregistered association, under the Companies Acts, 1862—1898 (*e*).

III. FRIENDLY SOCIETIES.—These societies, and some others of a somewhat similar character, were for a long time governed by the 38 & 39 Vict. c. 60 (The Friendly Societies Act, 1875), which repealed all the earlier Acts (*f*), and which had itself been variously amended and explained by the 39 & 40 Vict. c. 32, 42 & 43 Vict. c. 9, 45 & 46 Vict. c. 35, 50 & 51 Vict. c. 56 (The Friendly Societies Act, 1887), 52 & 53 Vict. c. 22, 56 & 57 Vict. c. 30, and 58 & 59 Vict. c. 26,—the Acts of 1875 and 1887 having been those of principal importance ; but all these societies are now regulated by (and are subject to the provisions contained in the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25) which came into force on the 1st January 1897,—the Act of 1896 being, however, merely a consolidation Act. Also, all the prior Acts are now wholly repealed (although the repeal is merely formal) by the Act of 1896, as aided by the 59 & 60 Vict. c. 26 (called the Collecting Societies and Industrial Assurance Companies Act, 1896). And under the Friendly Societies Act, 1896 (as under the former Acts) may be registered the following classes of societies :—

1. *Friendly Societies* (with or without *Branch Societies*) established to provide by voluntary subscriptions of the members, either with or without the aid of donations, for one or other of the following objects :—(*i*.) For the relief or maintenance of the members, their families, relations,

(*e*) 50 & 51 Vict. c. 47, s. 3.

(*f*) 18 & 19 Vict. c. 63 ; 21 & 22 Vict. c. 101 ; and 23 & 24 Vict. c. 58 ; but the 17 & 18 Vict. c. 56 (being the Act which specially provided for certain then existing friendly societies, whose powers

extended to granting policies of assurance on the death of members exceeding 1,000*l*.) remained in force, excepting as regards the proviso in sect. 8 ; but such societies were no longer to be deemed friendly societies.

or orphan wards, during sickness or other bodily or mental infirmity, in old age (which means after the age of fifty) or in widowhood, or for the relief or maintenance of the orphan infant children of members ; (ii.) For insuring money to be paid on the birth of a member's child, or on the death of a member, or for funeral expenses or (in the case of Jews) for living expenses during the period of confined mourning ; (iii.) For the relief or maintenance of members, when on travel in search of employment, or when in distress, or in case of shipwreck or of loss of or damage to boats or nets ; (iv.) For the endowment of members or of their nominees at any age ; or (v.) For insurance against fire, of tools or implements of trade, to the amount of 15*l.* (*g*). But no such society may grant any annuity exceeding 50*l.* per annum, or an assurance exceeding 200*l.* gross sum (*h*) ; also, careful enactments are made to prevent abuse in insurances on the lives of children (*i*).

2. *Cattle Insurance Societies*, for the insurance to any amount, against loss of neat cattle, sheep, lambs, swine, and horses by death from disease or otherwise.

3. *Benevolent Societies*, for any benevolent or charitable purpose.

4. *Working Men's Clubs*, for purposes of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation.

And 5. *Specially Authorized Societies*, for any purpose authorized by the treasury (*k*).

(*g*) 59 & 60 Vict. c. 25, s. 8
(sub-s. (1)).

(*h*) *Ibid.*

(*i*) *Ibid.* ss. 62—67, 84.

(*k*) *Trades Unions* may also be registered (see 34 & 35 Vict. c. 31 ; 39 & 40 Vict. c. 22) ; and the registrar of friendly societies is

also the registrar of trades unions ; but such unions are not (properly speaking) friendly societies ; nor do the Friendly Societies Acts in general include them. (*The Queen v. Registrar of Friendly Societies*, Law Rep., 7 Q. B. 741.)

Such being the different classes of societies which may be registered, it is to be observed, that the general superintendence of all friendly societies is entrusted to a chief registrar and assistant registrars (termed in the Act, “the Central Office”), a report of whose proceedings is to be laid annually before parliament (*l*) ; and no society can apply to be registered which does not consist of seven persons at the least (*m*) ; and every registered society is required to have a registered office (*n*)—to appoint trustees—and to submit its accounts for audit once at least in every year (*o*) ; and to send to the registrar an annual return of the receipts and expenditure, funds, and effects of the society, as well as quinquennial returns of certain particulars mentioned in the Act (*p*). A certificate of registration given by the registrar is *primâ facie* conclusive evidence of the due registration of the society ; and in case of the registrar’s refusal to register, an appeal lies to the Queen’s Bench Division (*q*).

With respect to the privileges acquired by registration, these societies become thereby exempted from the provisions of the 39 Geo. III. c. 79 and 57 Geo. III. c. 19 (called respectively the Unlawful Societies Act, 1799, and the Seditious Meetings Act, 1817) (*r*) ; and also from the payment of certain stamp duties which would otherwise be chargeable on them in the transaction of their business (*s*) ; and any member not under the age of sixteen may (subject to the regulations of the society) cause any money payable on his death, to the extent of 100*l.* (formerly 50*l.*), to be paid over to his nominee, and exercise other rights from which his non-age would, under the general law, exclude him (*t*) ; and upon his death

(*l*) 59 & 60 Vict. c. 25, ss. 1—7.

(*m*) Sect. 9.

(*n*) Sect. 24.

(*o*) Sects. 25, 26.

(*p*) Sects. 27, 28.

(*q*) Sects. 11, 12.

(*r*) Sect. 32.

(*s*) Sect. 33.

(*t*) Sect. 56.

intestate without making any nomination, such money (not exceeding the amount aforesaid) may be paid over to the person or persons appearing to the trustees to be entitled thereto, without the necessity for administration (*u*),—but (when the net amount payable exceeds 80*l.*) the legacy or other duty is to be first paid. And further, the society has, to a certain extent, a preference over other creditors in the case of the death, bankruptcy, or insolvency of its officers, with the money or property of the society in their possession (*x*). And as to the general property and funds of the society, the trustees may invest the same (subject to the Act), either in a savings bank (post office or other), or in the public funds, or with the National Debt Commissioners; or even in the purchase of land, or in the erection of buildings thereon; or upon any other security expressly directed by the society's rules—not being (unless in the case of loans to members) personal security; and all property of the society vests in the trustees thereof for the time being, for the use and benefit of the society and its members (*y*). The Act contains also provisions to the effect, that every dispute between a member, or one claiming under him or under the rules, and the society, shall be decided in such manner as shall be directed by the rules; and shall not be removable into any court of law,—though the decision, when made, may be *enforced* by application to the county court of the district; but where the rules contain no direction as to disputes, or where the decision is unreasonably delayed, application for a decision may be made either to a court of summary jurisdiction—that is, to the justices—or to the county court (*z*). The Act contains also minute provisions regulating the secession of lodges and branches,

(*u*) 59 & 60 Vict. c. 25, s. 58.

(*x*) Sect. 35.

(*y*) Sect. 44; *In re Coltman*,

Coltman v. Coltman, 19 Ch. D. 64.

(*z*) Sect. 68.

from other branches, or from the parent or principal society ; and for the dissolution of the society, and for the ascertainment and liquidation or distribution of its assets and liabilities (*a*).

And by the 60 & 61 Vict. c. 15, a “ specially authorized society ” may (if its rules so provide) receive deposits and borrow money at interest, from its members or from other persons.

There is a class of societies, called *Industrial and Provident societies*, similar in many respects to friendly societies, and which may be registered like those societies ; and as from the 1st January, 1894, industrial and provident societies are now regulated by the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), which repeals the earlier Act, 39 & 40 Vict. c. 45, but re-enacts, with divers amendments, the provisions of the repealed Act ; and the principal Act itself has been, in some slight particulars, amended by the 57 & 58 Vict. c. 8, and 58 & 59 Vict. c. 30 ; but regarding these societies, and certain others referred to in the foot-note below (*b*), we must refer the student to the Acts themselves, merely observing that they resemble, in most particulars, the ordinary friendly societies we have already spoken of.

III.A. BENEFIT BUILDING SOCIETIES.—These are societies established (subject to the provisions of the Building Society Acts) for the objects specified in their rules ; and the principal object is usually to raise a subscription fund, by levies from the members of the society, and to make

(*a*) 59 & 60 Vict. c. 25, ss. 78—83.

(*b*) 3 & 4 Vict. c. 110, and 26 & 27 Vict. c. 56 (as to *loan societies*) ; and 25 & 26 Vict. c. 44, and 28 &

29 Vict. c. 126 (as to *discharged prisoners' aid societies*) ; and 59 & 60 Vict. c. 26 (as to *collecting societies*, and other *industrial assurance societies*).

advances thereout to the members, to enable them to build or purchase dwelling-houses, or to purchase land, the advances being secured to the society by mortgage of the premises so built or purchased. The existing Building Society Acts are the 37 & 38 Vict. c. 42, 40 & 41 Vict. c. 63, 47 & 48 Vict. c. 41, and 57 & 58 Vict. c. 47, the first of these (called the Building Societies Act, 1874) being the principal Act. Under these Acts, societies of this description, (their rules being duly registered as required by the Acts, and being duly certified by the registrar,) enjoy certain special privileges and exemptions; and (among other privileges) their members enjoy the protection of limited liability; and may transfer their shares without payment of stamp duties; and may procure re-conveyances of the property mortgaged by them to their society, by a mere receipt for the money advanced indorsed on the mortgage deed, and without incurring the expense of a formal re-conveyance (*c*); but the mortgage deed itself is not exempt from stamp duty,—although the re-conveyance is exempt (*d*). These societies had originally no power to borrow (*e*),—in the absence at least of a rule expressly authorizing them to do so; but a limited power of borrowing money has now been conferred upon them by the principal Act (*f*). All disputes between the society and its members are to be settled by the convenient and economical method provided by the Act, being in general arbitration (*g*). Lastly, the society (which may be either a terminating or a permanent one) may be dissolved upon

(*c*) 37 & 38 Vict. c. 42, ss. 14, 41, 42.

(*d*) *Ibid.* ss. 41, 42.

(*e*) *Ex parte Watson*, 21 Q. B. Div. 301; *Blackburn Benefit Building Society's Case*, 9 App. Cas. 857.

(*f*) 37 & 38 Vict. c. 42, s. 15.

(*g*) 37 & 38 Vict. c. 42, ss. 34, 35; *Mulkern v. Lord*, 4 App. Cas. 182; and (since 47 & 48 Vict. c. 41) *Western Suburban Society v. Martin*, 17 Q. B. D. 66, 609; *Municipal Society v. Richards*, 39 Ch. Div. 372.

the happening of the event (if any) on which it is by the rules made to determine; or it may be dissolved in any manner as prescribed by its own certified rules or by the Act; or it may be wound up either voluntarily or compulsorily under the Companies Acts, 1862—1898 (*h*).

(*h*) 37 & 38 Vict. c. 42, s. 32; 57 & 58 Vict. c. 47, s. 8.

CHAPTER IV.

OF THE LAWS RELATING TO EDUCATION.

THE subject of national education being deemed one deserving the attention of the legislature, "The Elementary Education Act, 1870," was passed with a view to the compulsory education of the masses ; and of the general provisions of that Act, and of the Acts by which it has been successively amended, we shall give the reader some account in this chapter ; but there being also other important statutes connected with the subject of education of which it is also desirable to give some account, the chapter will be devoted to the discussion—I. Of Public Elementary Education ; II. Of Public (and of Endowed Grammar) Schools ; III. Of Sites for Poor Schools, and for Literary and Scientific Institutions ; IV. Of Parliamentary Grants in Aid of the Education of the Poor ; V. Of Pauper Schools ; VI. Of Reformatory Schools ; and VII. Of Industrial Schools.

I. PUBLIC ELEMENTARY EDUCATION.—The chief provisions on this subject will be found in the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), the general scheme of which remains unaltered, although in certain points of detail alterations have been effected by the Elementary Education Acts, 1873 (36 & 37 Vict. c. 86) ; 1876 (39 & 40 Vict. c. 79) ; 1880 (43 & 44 Vict. c. 23) ; 1890 (53 & 54 Vict. c. 22) ; 1891 (54 & 55 Vict. c. 56) ; and 1897 (60 & 61 Vict. c. 16) ; and (as to *voluntary* schools, as opposed to board schools) 1897 (60 & 61 Vict. c. 5) ; and (as to blind and deaf

children) 1893 (56 & 57 Vict. c. 42) (*a*). Under that general scheme, the whole of England is portioned out into *school districts*; and, for each district, there is provided a sufficient amount of accommodation in public elementary schools, available for all the children resident in such district, for whose elementary education efficient and suitable provision is not otherwise made (*b*); and, in general, every borough (and also every parish not included in a borough) forms a school district by itself (*c*)—though two or more adjoining districts may be united together where such union seems expedient; also, the metropolis forms a district of itself (*d*).

When the Education Department of the Privy Council (to whom the general carrying out of the scheme is entrusted) give public notice, that for any school district there is insufficient public school accommodation, and the deficiency is not supplied by private enterprise, there is to be formed for such district a school board (*e*), consisting of not less than five nor more than fifteen members (*f*), to be elected, for the term of three years, *by ballot* (*g*); the electors being (in the case of a borough) the persons on the burgess roll, and (in the case of a parish not included in a borough, or in the case of the metropolis) the rate-payers (*h*). And to these school boards is entrusted the working out of the provisions of the Act, but always under the general superintendence and control of the Education Department; and each board is to provide a sufficient number of public elementary schools within its

(*a*) See also 34 & 35 Vict. c. 94; 35 & 36 Vict. cc. 27, 59; 36 & 37 Vict. c. 49; 37 & 38 Vict. c. 90; 42 & 43 Vict. cc. 6, 48; 43 & 44 Vict. c. 23; 47 & 48 Vict. cc. 43, 70; 48 & 49 Vict. c. 38; 56 & 57 Vict. c. 51; 60 & 61 Vict. c. 32.

(*b*) 33 & 34 Vict. c. 75, s. 5.

(*c*) 33 & 34 Vict. c. 75, s. 4, and First Schedule.

(*d*) Sects. 40—47.

(*e*) Sect. 6.

(*f*) Sect. 31.

(*g*) Second Schedule (Pt. I.); and 36 & 37 Vict. c. 86, ss. 5—9, and Schedule.

(*h*) 33 & 34 Vict. c. 75, s. 29.

district, each school to be conducted in accordance with the regulations provided by the Acts, and of which the principal are the following:—(1.) That it shall not be required, as a condition of any child being admitted to or continuing in a school, that he shall attend (or abstain from attending) any Sunday school or place of public worship, or that he shall attend any religious observance or instruction from which he may be withdrawn by his parents ; (2.) That the period during which any religious observance is practised, or instruction in religious subjects given, in the school shall be at prescribed times either at the beginning or at the end of the school hours ; (3.) That the school shall at all times be open to the inspection of her Majesty's inspectors of schools, who shall not, however, in the exercise of their duties, inquire into the instruction given to the scholars in religious subjects (*i*) ; and (4.) That no religious catechism or formulary, which is distinctive of any particular denomination, shall be taught in the school (*k*). And if any school board does or permits any act in contravention of (or fails to comply with) the prescribed regulations, the Education Department may declare such board to be "in default" (*l*) ; and may thereupon, proceed to appoint fresh members thereof ; and on such appointment, the previous members shall be deemed to have vacated their offices, as if they were dead (*m*) : and the new members so appointed are to hold office during the pleasure of the Education Department ; who, when they consider that the default has been remedied, and everything necessary for that purpose has been carried into effect, may order that members may be elected again for the school board of the district in the usual way (*n*) ; or

(*i*) 33 & 34 Vict. c. 75, s. 7.

(*l*) Sect. 16.

(*k*) *Ibid.* s. 14 ; *Att.-Gen. v. English, and National Society v. London School Board*, Law Rep., 18 Eq. Ca. 608.

(*m*) Sect. 63.

(*n*) *Ibid.*

the Education Department may, should they be of opinion that a school board is in default, or that it is not properly performing its duties, order the then members of the board to vacate their seats, and the vacancies to be filled up by a new election (*o*) ; but in all cases of the Education Department intervening in either of these ways, a report is to be laid before parliament, stating the cases in which, during each year, this power has been exercised, and the reasons for its exercise (*p*).

Among the other provisions of the Elementary Education Acts, we may notice (1) the provision whereby a parent, who, though not a pauper, was unable by reason of poverty to pay his child's school fees, might apply to the guardians of his parish for relief in that respect ; and if the guardians were satisfied of his inability, they were to pay the whole or any part of such fees to the extent of threepence a week ; and no such payment was to be deemed disqualifying relief (*q*) ; also, (2) the provision, that a school board might sanction the establishment of a school at which no fees whatever should be required from the scholars,—which last mentioned provision might have been resorted to, where (in the opinion of the school board) such free school was expedient in the interests of education, and the poverty of the inhabitants of the place justified its establishment (*r*) ; but both these provisions have now been (in effect) superseded by the Elementary Education Act, 1891, which has made education free, in the case of all schools receiving the “ fee grant ” of 10s. per child provided for by the Act (sects. 1—3) ; although, in special cases, a charge not exceeding sixpence per week for each child may still be sanctioned (sect. 4).

(*o*) 33 & 34 Vict. c. 75, s. 66.

(*p*) Sect. 66 ; and see (as to School Board Conferences) 60 & 61 Vict. c. 32 ; and (as to the super-

annuation pensions of school teachers) 61 & 62 Vict. c. 57.

(*q*) 39 & 40 Vict. c. 79, s. 10.

(*r*) 33 & 34 Vict. c. 75, s. 26.

And with a view to securing compulsory attendance at schools, every school board—and in a borough, the “local authority,” or school attendance committee thereof,—is authorized, with the approval of the Education Department, to make bye-laws for all or any of the following purposes:—

(1.) Requiring the parents of children between the ages of five and thirteen to cause such children (unless there is some reasonable excuse) to attend school; (2.) Determining the time during which the children are so to attend school; and (3.) Providing for the remission or payment of the fees, where the parent can establish his inability from poverty to pay same (*s*). But any bye-law under which a child between the age of ten and thirteen is required to attend school, is to provide for the total or partial exemption of such child, if he or she obtain a certificate, from one of her Majesty’s inspectors of schools, of having reached the standard of education in that behalf specified in the bye-law (*t*); and no such bye-law is to contravene the provisions of any statute regulating the education of children employed in labour (*u*). Also, it shall be deemed a reasonable excuse for a child’s non-attendance, (1.) If the child is under efficient instruction in some other manner; or (2.) If the child has been prevented from attending by sickness or other unavoidable cause; or (3.) If there is no public elementary school open, within the distance of three miles from the place of residence of such child, or of its parents (*x*).

These provisions for school board attendance have been much strengthened by the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), whereby it is expressly declared, that it shall be the duty of the parent of every child, between the ages of five and *fourteen* years, to cause it “to

(*s*) 33 & 34 Vict. c. 75, s. 74.

(*t*) *Ibid.*

(*u*) *Ibid.*; 36 & 37 Vict. c. 86, ss. 3, 22; 43 & 44 Vict. c. 23.

(*x*) 33 & 34 Vict. c. 75, s. 74.

receive efficient elementary instruction in reading, writing, and arithmetic" (*y*); and that, if this duty in regard to a child above the age of five years is habitually and without "reasonable excuse" neglected, it shall be the duty of the "local authority," after due warning to the parent, to complain to a court of summary jurisdiction (*z*); by whom an "attendance order" may be made, the non-compliance with which may be visited with a pecuniary penalty; and all persons are prohibited, under a penalty, from taking into their employment (subject to certain exceptions) any child, who is under the age of eleven (formerly ten), or who, being above that age but under the age of fourteen, is not *certificated*, or allowed by law to be fully or partially so employed (*a*); also, in the last resort, the child may be sent to a certified industrial school, to the expenses of which the parent will be liable to contribute.

The expenses of the school board are to be defrayed by fees from the scholars (but which fees have now, under the Act of 1891, entirely or almost entirely ceased to be payable); by parliamentary grants (*b*); and by moneys raised by loan (such loans being with the consent of the Education Department) (*c*); and any deficiency is to be raised by a local rate (*d*), to be levied by the rating authority of the district (*e*). Provision has also now been made, by the Technical Instruction Act, 1889 (*f*), enabling local authorities to supply, or aid in supplying, "*technical*" and "*manual*" instruction in the schools of their district,—the

(*y*) 39 & 40 Vict. c. 79, ss. 4, 48.

(*z*) *In re Murphy*, 2 Q. B. D. 397.

(*a*) 39 & 40 Vict. c. 75, ss. 5, 6, 9; 56 & 57 Vict. c. 61; and see the Agricultural Children Act, 1873 (36 & 37 Vict. c. 67).

(*b*) 39 & 40 Vict. c. 79, s. 19; 54 & 55 Vict. c. 56, s. 1.

(*c*) 33 & 34 Vict. c. 75, ss. 64,

65; 36 & 37 Vict. c. 86, s. 10; 39 & 40 Vict. c. 79, ss. 15, 42; and 42 & 43 Vict. c. 48, s. 3.

(*d*) 33 & 34 Vict. c. 75, s. 53.

(*e*) *Ibid.* s. 54; 39 & 40 Vict. c. 79, s. 49.

(*f*) 52 & 53 Vict. c. 76; 54 & 55 Vict. cc. 4, 61; 55 & 56 Vict. c. 29.

expense thereof being defrayed, in part by a local rate, and in part by a parliamentary grant; and for the purposes of the Act, "*technical instruction*" is defined by the Act (sect. 8), as meaning "instruction in the principles of science and art applicable to industries, and in the application of special branches of science and art to specific industries or employments"; and "*manual instruction*" is defined by the Act, as meaning "instruction in the use of tools, processes of agriculture, and modelling in clay, wood, or other material." And regarding the divers administrative changes introduced (in rural parishes more especially) by the Local Government Act, 1894 (56 & 57 Vict. c. 73), it is to be observed, that none of these changes affect in any way the trusteeship, management, or control of any elementary school (sect. 66).

II. PUBLIC AND (ENDOWED GRAMMAR) SCHOOLS.—In the year 1861, a royal commission issued to inquire into the endowments, and generally into the management, of our "*public schools*"; and in their report, a variety of changes in the government, management, and studies of these schools (or of certain of them, viz., the schools or colleges of Eton, Winchester, Westminster, Charterhouse, Harrow, Rugby, and Shrewsbury), were recommended for adoption; and a temporary Act (27 & 28 Vict. c. 92) having been passed, to prevent the acquisition in the meantime of vested interests, a succession of Acts called the "*Public Schools Acts*" (*g*) were afterwards passed, to carry into effect the principal changes recommended by the commissioners; and of these Acts, the Public Schools Act, 1868 (31 & 32 Vict. c. 118), is the principal Act. And by the principal Act, it was enacted, that the "*governing body*" which existed at the date of the Act in any of the above schools, might,

(*g*) 31 & 32 Vict. c. 118; 32 & 33 Vict. c. 58; 34 & 35 Vict. c. 60; 35 & 36 Vict. c. 54; 36 & 37 Vict. c. 41, and c. 62.

within the time prescribed by the Act, proceed to make such statutes as they might deem expedient, for determining and establishing the constitution of the future governing body of such school ; but that, after such time had expired, all the powers of making statutes with that object should pass to certain “special commissioners” provided for by the Act (*h*) ; and the new governing body was to have power to make regulations with respect to the number of the boys, the mode in which they were to be boarded and lodged, the payments to be made for their maintenance and education, the course of study, the powers to be committed to the head master, and the like (*i*) ; and was also to have power to make statutes, with regard to a variety of matters connected with the school (*k*), including the privileges, numbers, and rules for admission of boys on the foundation of the school, or who had rights as to education in the school ; regulations as to scholarships, exhibitions, and the like ; the conditions of the appointment to ecclesiastical benefices vested in the governing body ; the number, position, rank, salaries, and emoluments of the masters ; and the disposal of the income of the property of the school. But all such regulations and statutes, to be so made by the new governing body, required to be submitted for the approval of the special commissioners, and of her Majesty in council (*l*) ; and the Act provided, that (subject to any vested interests) the head master of every public school to which it applied should be appointed by, and should hold his office at the pleasure of, the new governing body ; and that all other masters should be appointed by, and should hold their offices at the pleasure of, the head master (*m*).

And with respect to “*endowed grammar schools*,” being schools in which Latin and Greek or either of such

(*h*) 31 & 32 Vict. c. 118, s. 5.

(*i*) Sect. 12.

(*k*) Sect. 6.

(*l*) Sect. 9.

(*m*) Sect. 13; *Hayman v Governors of Rugby School*, Law Rep., 18 Eq. Ca. 28.

languages are taught (exclusive of the schools to which the Public Schools Acts apply), it was enacted, by an Act passed in the year 1840 (3 & 4 Vict. c. 77), for improving and extending such schools, that, whenever any question came under the consideration of a court of equity, concerning the system of education thereafter to be established in any grammar school, or the right of admission into the same, it should be lawful for that court to make decrees or orders,—for extending the system of education in the school in question to other useful branches of literature and science, for regulating the right of admission into the school, and for establishing a scheme for the better application of its revenues,—paying due regard nevertheless to the intentions of the founders and benefactors, as well as to other circumstances ; and where any special visitor existed, giving him an opportunity to be heard. And, in many respects also, this Act placed the management of such schools under the control of Chancery ; and provided, that the jurisdiction should be exercised on petition, according to the provisions of the 52 Geo. III. c. 101, with regard to charitable trusts (*n*). And by an Act passed in the year 1860 (23 & 24 Vict. c. 11), the trustees or governors of any endowed school were enabled (subject to a variety of exceptions particularized in the Act) to make orders, for the admission to such school of children whose parents were not in communion with the church or sect to which the endowment belonged. But the relief given by these enactments not being deemed adequate, a royal commission issued in the year 1864 to inquire into the education given in schools of the following classes, that is to say :—1. Grammar and other endowed schools ; 2. Proprietary schools ; and 3. Private schools ; and the report of this commission having been in due course laid before parliament, and a temporary Act (31 &

(*n*) 3 & 4 Vict. c. 77, s. 21.

32 Vict. c. 32) having been passed, with the object of preventing the acquisition of vested interests pending legislation on the subject, the recommendations of the commissioners have for some time been, and are now being, gradually carried into effect, under the provisions of a group of statutes known as the "Endowed Schools Acts, 1869, 1873 and 1874," being respectively the 32 & 33 Vict. c. 56 ; 36 & 37 Vict. c. 87 ; and 37 & 38 Vict. c. 87,—and in the meantime, the temporary Act has been directed, by the 38 & 39 Vict. c. 29, to continue in force, as long as anything remains unexecuted under the Endowed Schools Acts. And in the year 1889, these Acts received an important addition, in the "Welsh Intermediate Education Act, 1889" (52 & 53 Vict. c. 40) ; by which last mentioned Act, provision has been made, for the regulation and endowment of schools for intermediate and technical education in every county of Wales and in the county of Monmouth,—the schemes therefor being approved by the Charity Commissioners, and the endowment thereof consisting of such of the local educational endowments as may be appropriated in that behalf, augmented by a payment out of the county rates, and by an equivalent payment to be made by the Treasury ; and a joint education committee of the county council has been assigned, for the better regulation of all such schools.

Under the provisions of the "Endowed Schools Acts," and as regards the schools comprised within the purposes of these Acts,—but not as regards other schools,—there is committed to the Charity Commissioners (*o*) the duty of preparing, after such examination or public inquiry as they may think necessary, draft schemes framed in order to render any educational endowment more conducive to

(*o*) 36 & 37 Vict. c. 87 ; 37 & 38 Vict. c. 87 ; *Att.-Gen. v. Christ Church, Oxford*, [1894] 3 Ch. 524.

the advancement of education (*p*) ; and with this object, these Commissioners may, in such schemes, alter and add to any existing trusts ; and may make new trusts, directions, and provisions in lieu of those previously existing ; and may consolidate or divide any two or more endowments (*q*). And such schemes may also contain provisions for altering the constitution, rights, and powers of the governing body of any educational endowment, and for establishing new governing bodies, corporate or unincorporate ; and may remove any governing body, or if it shall be incorporated, may dissolve such corporation (*r*)—it being the duty of the commissioners, in every scheme whereby the privileges or educational advantages of any particular class of persons, or of persons in any particular class of life, shall be abolished or modified, to have due regard to their educational interest (*s*)—and, so far as conveniently may be, to extend the benefit of endowments to girls as well as boys (*t*). And with regard to the subject of religious teaching, in every scheme (except only such as have reference to schools maintained out of the endowments of any cathedral or collegiate church, or the scholars whereof are required by the founder to be instructed according to the doctrines or formularies of some particular church, sect, or denomination), there is to be inserted a provision, that the parent or guardian, or person liable to the child's maintenance, may claim the exemption of any day scholar from attending prayer or religious worship or instruction (*u*) ; that the religious opinions of any person shall not affect his qualification for being one of the governing body (*x*) ; and that he shall not be disqualified for being

(*p*) 32 & 33 Vict. c. 56, s. 9 ;

In re Meyricke Fund, Law Rep.,
7 Ch. App. 500.

(*q*) 32 & 33 Vict. c. 56, s. 9.

(*r*) Sects. 9, 10.

(*s*) Sect. 11 ; 36 & 37 Vict. c. 87,

s. 5.

(*t*) 32 & 33 Vict. c. 56, s. 12.

(*u*) Sects. 15, 16.

(*x*) Sects. 17, 19 ; 36 & 37 Vict.
c. 87, s. 6 ; and *In re Hodgson's
School*, 3 App. Ca. 875.

a master, by reason only of his not being (or intending to be) in holy orders (*y*). And every scheme is to provide for the dismissal, at the pleasure of the governing body, of every teacher and officer in the school to which the scheme relates, including the principal teacher,—with or without a power of appeal, in such cases and under such circumstances as to the commissioners shall seem expedient (*z*).

Any scheme proposed by the commissioners is to be printed and sent to the governing body of the endowment to which it relates, and also to the principal teacher of the school to which it relates ; and is also to be circulated in such other way as the commissioners may think proper, in order to give information to all persons interested (*a*) : and if any objections to the scheme are made in writing, or any alternative scheme is suggested for consideration, within three months of the publication of the proposed scheme, the commissioners (or an assistant commissioner) may hold an inquiry concerning the subject-matter of the proposed scheme ; and may submit an approved scheme to the committee of council on education, by whom it may be either approved or re-framed,—anyone who finds himself aggrieved by the proposed scheme being at liberty to present a petition against it to her Majesty in council (*b*) ; and the scheme is ultimately laid before parliament for its assent, but which assent is implied, if neither house address the crown on the matter within forty days from the scheme being laid before it (*c*).

III. SITES FOR SCHOOLS FOR THE POOR, and FOR LITERARY AND SCIENTIFIC INSTITUTIONS.—The Act 4 & 5 Vict. c. 38, which was passed to facilitate the conveyance of “Sites for Schools,” and which, with the undernoted

(*y*) 32 & 33 Vict. c. 56, s. 18.

(*z*) Sect. 22.

(*a*) Sect. 33.

(*b*) *In re Shaftoe's Charity*, 3 App. Ca. 872.

(*c*) 32 & 33 Vict. c. 56, ss. 39—41.

Acts amending it (*d*), is popularly cited as the “School Sites Acts,” has provided,—that any person legally or equitably entitled in fee simple, in fee tail, or for life in possession, to any lands of freehold, copyhold, or customary tenure, and having the beneficial interest therein, may grant by way of gift, sale, or exchange in fee simple, or for term of years, any quantity of such land not exceeding *one acre*, as a site for a school to educate poor persons, or for the residence of the master or mistress of such school, or otherwise for the purposes of the education of poor persons in religious and useful knowledge (*e*); any such grant, when made by any person entitled for life only, where the person next entitled in remainder in fee simple or in fee tail is legally competent, having the concurrence of such remainderman; and the grant is in all cases to provide (and the statutes themselves provide) that, upon the land ceasing to be used for the purposes of the grant, it shall revert to the donor (*f*). And the like grant may be made by any corporation, ecclesiastical or lay, sole or aggregate, an ecclesiastical corporation sole below the dignity of a bishop obtaining the consent in writing of the bishop of the diocese; and the like grant of, or provision for, a school site may be made (by the proper allotment) on any inclosure of a common (*g*). And by the 15 & 16 Vict. c. 49, the provisions of the School Sites Acts are made applicable to such schools or colleges, for the religious or educational training of the sons of yeomen, tradesmen or others, or for the theological training of candidates for holy orders, as are erected or maintained in part by charitable aid, and in part are self-supporting, ecclesiastical corporations (as regards such grants) being restricted to schools or colleges in union with the

(*d*) 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; and 45 & 46 Vict. c. 21.

(*e*) 4 & 5 Vict. c. 38, s. 2.

(*f*) 4 & 5 Vict. c. 38, s. 2.

(*g*) 8 & 9 Vict. c. 118, s. 34; and 20 & 21 Vict. c. 31, s. 13.

Established Church ; and by the 33 & 34 Vict. c. 75, these provisions were also made applicative to the public elementary schools already treated of in this chapter.

Also, by the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112),—it is provided that the same facilities as are afforded by the School Sites Acts, in respect of schools for poor persons, shall be available in respect of such institutions, subject to the like provisions as are applicable to sites for schools, namely, that any grant, when made by a person seised only for life, shall have the concurrence of the remainderman in fee simple or in fee tail, if legally competent in that behalf; and that the land granted shall revert to the donor, on its ceasing to be used for the purposes of the grant,—except only in the case of a removal of site, when such land may be exchanged or sold for the benefit of the institution. The Act contains also a variety of other provisions with reference to these institutions,—relating chiefly to the persons by and to whom, and the manner in which, conveyances of these sites may be made, and as to the form of such conveyances; to the subsequent sale or exchange of the land conveyed; to the liability of the grantees to rates, taxes, and other charges and expenses; to the manner in which the personal property of the institution shall be vested; to the manner in which actions by or against the institution may be brought, and in which judgment therein shall be satisfied; to the power of making bye-laws, to be enforceable in the county court of the district; to the liability of individual members to be sued or prosecuted in matters affecting the property of the institution; and to the manner in which the institution may effect an alteration, extension, or abridgment of the purposes for which it was established, or may effect its own dissolution, or the adjustment of its affairs.

The provisions for the acquisition of school sites and the like, are additional to the provisions contained in

the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 6, whereby land may be conveyed by deed (to any extent) and by will (to the extent of twenty acres for a public park, two acres for a public museum, and one acre for a schoolhouse),—the deed or will being executed twelve calendar months before the death of the donor, and being enrolled in the books of the Charity Commissioners within six months after the date as from which the gift operates (*h*).

Also, under the Technical and Industrial Institutions Act, 1892 (55 & 56 Vict. c. 29), s. 7, sites for such institutions may, to an extent not exceeding two acres, be freely granted by limited owners,—but only with the consent of the next remainderman, or else with the sanction of the Court; and every such grant is to be forthwith enrolled with the Charity Commissioners (sect. 10).

IV. PARLIAMENTARY GRANTS FOR THE EDUCATION OF THE POOR.—By the statute 7 & 8 Vict. c. 37,—after reciting that, during several years past, divers sums of money had been granted by parliament to her Majesty, to be applied for the purpose of promoting the education of the poor in Great Britain, and that similar grants might thereafter be made,—it was provided, that where any such grant had been or should thereafter be made in aid of the purchase of the site, or of the erection enlargement furnishing or repair of a school, or in respect of the residence of the master or mistress thereof, upon terms and conditions providing for the inspection of the school by an inspector appointed by her Majesty, such terms and conditions should be obligatory on the trustees and managers of the school, in like manner as if they had been inserted in the conveyance of the site of the school, or in the declaration

(*h*) See also Working Classes Dwellings Act, 1890 (53 & 54 Vict. c. 16),—regarding sites in populous places.

of the trusts thereof,—provided that such terms and conditions were set forth in some document signed by the trustees, or by the major part of them, or (in the case of a voluntary gift) by the party conveying the site. And by the 18 & 19 Vict. c. 131, in order that greater security might be afforded for the due application of money advanced to the trustees or managers of schools out of parliamentary grants for any of the above purposes,—it was provided, that where any such grant should be made, no subsequent sale, exchange, or mortgage of the premises should be valid, unless either the written consent of a secretary of state should be given to the same, or else the amount of the grant was repaid,—but the Act did not apply to any school, in respect of grants made *previously* to the statute without any such condition imposed. And under the Elementary Education Act, 1870,—by which (as we have seen) the School Sites Acts were made applicable to public elementary schools (sect. 20),—school boards (sect. 20) and school managers (sect. 21) are enabled to acquire by purchase (by agreement with the owners thereof) the necessary lands and buildings for schools ; and (with the sanction of the Education Department) may even compulsorily acquire such lands and buildings; and (by sect. 23) school managers may transfer their school-houses to school boards ; and parliamentary grants in aid of the building or enlargement of schools may, in a proper case, be obtained on *memorial* to the Education Department (sect. 96). And (by sect. 22) the sale, leasing, and exchange of school lands and school buildings, not required by the school board or by the school managers, may be effected (with the sanction of the Education Department) equally as if they were charity lands subject to the Charitable Trusts Acts before mentioned,—the Education Department being (for this purpose) substituted for the Charity Commissioners ; and (by sect. 57, as amended by sect. 10 of the 36 & 37 Vict.

c. 86) the purchase-money or other expenses payable for acquiring land for a school, and for building a school-house or of otherwise providing or enlarging a school, may (with the sanction of the Education Department) be raised by way of loan. And by an express provision of the Elementary Education Act, 1870, no parliamentary grant in aid of building, enlarging, improving, or fitting up any elementary school is to be made except in pursuance of such *memorial* as before referred to (*i*); nor is any parliamentary grant to be made to any elementary school which is not a “public elementary school” within the meaning of the Act; but whether the school is or is not provided by a school board is of no consequence, as regards obtaining the grant, so long as it is a public elementary school (*k*). And *voluntary* schools (that is to say, all public elementary schools other than board schools) have been latterly assisted financially by the 60 & 61 Vict. c. 5.

V. PAUPER SCHOOLS.—Under the provisions of the 7 & 8 Vict. c. 101, s. 40 (as amended by the 11 & 12 Vict. c. 82, 13 & 14 Vict. c. 101, and 31 & 32 Vict. c. 122), parishes and unions may be combined into *school districts*,—for the instruction of such of their chargeable infant poor (not being above the age of sixteen) as are orphans, or deserted by their parents, or whose parents or guardians consent to their being placed in such district schools; and (by sect. 42) a board of managers, consisting of members chosen from the rate-payers of the district, is constituted for every such school district; and (by sect. 43) the board of managers, with the consent of the bishop of the diocese, appoints at least one chaplain of the Established Church to superintend the religious instruction of the scholars, any scholars not belonging to that church (whose parents or

(*i*) 33 & 34 Vict. c. 75, s. 96; (*k*) 33 & 34 Vict. c. 75, s. 97.

39 & 40 Vict. c. 79, s. 20.

next of kin desire it) being visited and instructed in religion by a minister of the particular sect or persuasion to which they may belong; and an inspector of schools visits such district schools, and examines into the proficiency of the children therein, as in the case of public elementary schools. And the 25 & 26 Vict. c. 43 enables the guardians of any parish or union to send any poor child, (being an orphan or deserted, or else with the consent of his or her parents,) to any school certified as fit for the purpose, (not being a reformatory school or a school conducted on principles contrary to the particular religious sect or persuasion to which the child may belong,) and although such school may be supported wholly or in part by voluntary subscriptions, provided the school manager is willing to receive the child; and also authorizes them to pay the expenses incurred for the maintenance, clothing, and education of the child at such school, out of the funds in their possession—to the extent, at least, of what the child's maintenance in the workhouse would have cost them during the same period. Also, by the 36 & 37 Vict. c. 86, s. 3, repealing the previous Act (18 & 19 Vict. c. 34), commonly called Denison's Act, on the same subject, it was provided, that where *out-door relief* was given to the parent of any child (or to any child) between five and thirteen years of age, elementary education in reading, writing, and arithmetic in some public elementary school should be provided for the child thereout (or out of such further relief as should be necessary for that purpose,—such further relief being supplied by the guardians out of the poor law funds in their hands); and the county councils established under the Local Government Act, 1888 (*l*), were required (by section 24 of that Act) to make certain payments to the guardians for this purpose; and the provisions lastly stated do not appear to be materially affected, by

(*l*) 51 & 52 Vict. c. 41.

the Local Government Act, 1894 (56 & 57 Vict. c. 73), as regards the rural parishes to which that Act extends ; nor to be affected by the 56 & 57 Vict. c. 42 (relative to deaf and blind children), the last-mentioned Act not extending to workhouse children, or to children boarded out by the poor law guardians, although it does extend to other pauper children (sections 2, 13). Clearly, however, the free education now provided by the Elementary Education Act, 1891, before referred to, does (or ought to) apply to all pauper children, and does (or ought to) operate in relief of the parish or other poor law union accordingly (*m*).

VI. REFORMATORY SCHOOLS.—Under the statute 29 & 30 Vict. c. 117, which repeals certain earlier Acts on the same subject (*n*), and which has been amended by the 54 & 55 Vict. c. 23, and 56 & 57 Vict. c. 48, the Secretary for the Home Department, upon application made to him by the managers of any “reformatory school” (being a school established for the better training of youthful offenders), is empowered to direct an inspector of prisons (styled the inspector of reformatory schools) to examine into the condition and regulations of such school ; and (in case the inspector reports in its favour) the school may be certified as being fit for the reception of such offenders (*o*). And any court, magistrate, or justice before whom a person, under the age of *sixteen*, is convicted, and sentenced to receive punishment to the extent of ten days’ imprisonment at the least, may direct that, at the expiration of such period of confinement, the offender shall be sent to some such certified reformatory school (selecting, where possible, one conducted according to the religious persuasion, if any, to which the offender may belong), for a further period of

(*m*) See also (for the Metropolis) 18 Vict. c. 86; 19 & 20 Vict. c. 109
61 & 62 Vict. c. 45. and 20 & 21 Vict. c. 55.

(*n*) 1 & 2 Vict. c. 82, s. 11 ; 17 & (o) 29 & 30 Vict. c. 117, s. 4.

not less than two nor more than five years (*p*) ; or (if the offender appears to be of the age of twelve) for a period of not less than three nor more than five years (*q*). But if the offender is under the age of *ten*, then, in order that he may be so dealt with, the sentence must be at the assizes or quarter sessions ; or, else, the child must have been previously charged with some crime punishable with penal servitude or imprisonment (*r*). The home secretary may also at any time order the particular offender to be discharged from the school to which he has been sent ; or may direct the removal of any scholar from one school to another (*s*). Children from the Channel Islands may also be sent to any such reformatory schools (*t*). All the expenses incident to this treatment of juvenile offenders are to be defrayed, to the extent of five shillings per week, by the parent or other person liable for the maintenance of the child (if he or she is of sufficient ability) (*u*) ; but the commissioners of the treasury may contribute, out of money in that behalf provided by parliament, such sum as the home secretary may recommend, towards the expenses of any certified reformatory school (*x*) ; and the prison authorities may also contribute towards these expenses, but subject in general to the previous approval of the home secretary (*y*). The establishment and maintenance of, and the contribution to, reformatory schools is, however, now made part of the business transferred by the Local Government Act, 1888 (*z*), s. 3, to the county councils created by that Act.

VII. INDUSTRIAL SCHOOLS.—Under the statute 29 & 30 Vict. c. 118, which repeals the earlier Act (namely, the

(*p*) 29 & 30 Vict. c. 117, s. 14.

(*q*) 56 & 57 Vict. c. 48.

(*r*) 29 & 30 Vict. c. 117, s. 14.

(*s*) Sect. 17.

(*t*) 58 & 59 Vict. c. 17.

(*u*) 29 & 30 Vict. c. 117, s. 25.

(*x*) Sect. 24.

(*y*) Sect. 28 ; 28 & 29 Vict. c. 126, s. 5.

(*z*) 51 & 52 Vict. c. 41, ss. 3, 38.

Industrial Schools Act, 1861, 24 & 25 Vict. c. 113), on the same subject, the Secretary for the Home Department, upon the application of the managers of any “industrial school,” is empowered to direct an examination to be made by the inspector of reformatory schools (who is also to be the inspector of industrial schools) into the condition of the industrial school ; and may then grant a certificate constituting the same a certified industrial school within the meaning of the Act (*a*) ; and to such school the following classes of children may be sent, that is to say,—any child (not previously convicted of felony) who, being apparently under the age of *twelve*, is charged before two justices or a stipendiary magistrate with having committed an offence punishable by imprisonment, or with some less punishment ; also, any child who, being apparently under the age of *fourteen*, is brought before such justices or stipendiary as having been found begging or receiving alms, or as having been found in any street or public place for such purpose ; or as having been found wandering without any home or settled place of abode, or proper guardianship, or visible means of subsistence ; or as having been found destitute (either being an orphan, or having a surviving parent who is undergoing penal servitude or imprisonment), or found frequenting the company of reputed thieves (*b*) ; also, any child whose parent, step-parent, or guardian represents to such justices or stipendiary that the child is not amenable to his control, and that he desires him to be sent to such a school (*c*) ; also, any child whose mother has been convicted of a crime (a previous conviction for crime having been proved against her), and who, being under her care and control at the time of her conviction for the last of such crimes, has no visible means of subsistence or is without proper guardianship (*d*). Any child so circumstanced may,

(*a*) 29 & 30 Vict. c. 118, s. 7.

(*c*) 29 & 30 Vict. c. 118, ss. 14

(*b*) *Reg. v. Jennings*, [1896] 1

—16.

Q. B. 64.

(*d*) 34 & 35 Vict. c. 112, s. 14.

after full inquiry made into the facts of the case by the justices, be sent, for such period as may seem necessary for his education and training, to any certified industrial school, the managers of which shall be willing to receive him (*e*),—but not so as to extend the period of detention beyond the time when the child shall attain the age of sixteen ; beyond which age he cannot be detained except with his own consent in writing (*f*). But the Act requires that, if possible, a school shall be selected which is conducted in accordance with the religious persuasion to which the parent may belong ; and a minister of such persuasion may visit the child and instruct him in religion (*g*). The parent, or other person legally liable, may be ordered to pay a weekly sum, not exceeding five shillings, for the expenses of the child's maintenance and training at the school (*h*) ; and on the recommendation of the home secretary, funds for the custody and maintenance of children detained in certificated industrial schools, may be contributed, by the treasury, out of moneys in that behalf provided by parliament (*i*) ; and poor law guardians, prison authorities, and school boards, may, with the approval of the home secretary, contribute to these expenses (*k*). Also, children from the Channel Islands may be sent to any industrial schools in Great Britain (*l*). Instead of sending children to industrial schools, the justices may, however, now commit the custody of the children to their relatives or other fit persons, under the Prevention of Cruelty to Children Act, 1894 (*m*).

And here it may be added, that under certain provisions of the like character contained in the Prevention of Crimes

(*e*) 29 & 30 Vict. c. 118, s. 27 ;
39 & 40 Vict. c. 79, s. 14.

(*f*) 29 & 30 Vict. c. 118, ss. 18, 41.

(*g*) Sect. 25.

(*h*) Sects. 39, 40.

(*i*) Sect. 35.

(*k*) 29 & 30 Vict. c. 118, ss. 12,
37 ; 33 & 34 Vict. c. 75, s. 27 ;

36 & 37 Vict. c. 86, s. 14.

(*l*) 58 & 59 Vict. c. 17.

(*m*) 57 & 58 Vict. c. 41.

Act, 1871 (34 & 35 Vict. c. 112), certain other juvenile offenders may be sent to industrial schools,—as will be more particularly mentioned in the Sixth Book of these Commentaries, when we come to deal with crime, and its prevention. Moreover, a school board under the Elementary Education Acts may, with the sanction of a secretary of state, establish and maintain an industrial school, or (in a proper case) a *day* industrial school (*n*) ; and a child whose parent has disobeyed an “attendance order” made under the Elementary Education Act, 1876 (*o*), may be sent to such industrial school. The establishment and maintenance of, and the contribution to industrial schools is, however, now made part of the business transferred by the Local Government Act, 1888 (*p*), s. 3, to the county councils created by that Act.

(*n*) 42 & 43 Vict. c. 48 ; 43 & 44 Vict. c. 15.

(*p*) 51 & 52 Vict. c. 41, ss. 3, 38.

(*o*) 39 & 40 Vict. c. 79, ss. 11, 14, 16 ; 43 & 44 Vict. c. 23.

CHAPTER V.

OF THE LAWS RELATING TO LUNATIC ASYLUMS,
AND THEIR MANAGEMENT.

WE have had occasion elsewhere to explain the general state of the law with reference to idiots and lunatics (*a*) ; we now proceed to consider some of the more specific provisions made by the legislature for the reception, detention, and care of idiots and lunatics, in lunatic asylums or other like institutions.

Houses established for the reception of insane persons are of various descriptions,—some being established and maintained for the public benefit and at the public expense ; others (*e.g.*, the Royal Hospital of Bethlehem) (*b*), having been established by (and being maintained by means of the endowments of) charitable donors ; and others, again, being private houses kept by individuals for their own profit ; but every house, of whatever kind or class, is subject to the provisions regarding lunatics and lunatic asylums which have been enacted by the legislature. And we propose to treat, (I.) Of Lunatic Asylums (in counties and boroughs) ; (II.) Of Criminal Lunatics ; and (III.) Of the Treatment of Lunatics in general (including Idiots) ; but it does not fall to us here to consider the case of Habitual Drunkards, or (in connection with them) the provisions of the Inebriates Acts, 1879 to 1898 (42 & 43 Vict. c. 19, 51 & 52 Vict. c. 19,

(*a*) *Vide sup.* vol. I. p. 320 ;
vol. II. pp. 77, 83.

(*b*) 5 & 6 Vict. c. 22 ; 16 &
17 Vict. c. 96, s. 35 ; 25 & 26 Vict.
c. 104, s. 5.

and 61 & 62 Vict. c. 60), under which, for these afflicted persons, “*retreats*” and “*inebriate reformatories*” (c), may be established,—in which retreats and reformatories, drunkards, dipsomaniacs, and the like (criminal and otherwise) may be received ; and, under the 57 & 58 Vict. c. 41, inebriate parents may also now be sent to such retreats, instead of being otherwise punished as by that Act is appointed for cruelty to children.

(I.) LUNATIC ASYLUMS.—County lunatic asylums were first established by the 48 Geo. III. c. 96 ; but the regulations regarding county (and also borough) asylums which were latterly in force were contained in the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), as amended by the 18 & 19 Vict. c. 105, 19 & 20 Vict. c. 87, 25 & 26 Vict. c. 111, 26 & 27 Vict. c. 110, and 48 & 49 Vict. c. 52 ; and (as from the 1st day of May, 1890) all the last-mentioned Acts, together with the Lunacy Acts Amendment Act, 1889 (52 & 53 Vict. c. 41), have been repealed, and their provisions (with amendments) consolidated, in and by the Lunacy Act, 1890 (53 Vict. c. 5) (d), which last-mentioned Act has also in its turn been amended (but only in some few particulars) by the Lunacy Act, 1891 (54 & 55 Vict. c. 65).

By the provisions of the earlier Lunacy Acts, it was made incumbent on the justices of every county, to provide a sufficient asylum for its pauper lunatics, either

(c) These reformatories are either (1) *state inebriate reformatories* (when established by the government), or *certified inebriate reformatories* (when established by private persons). 61 & 62 Vict. c. 60, ss. 3, 5.

(d) The provisions applicable to county lunatic asylums are applicable also (*mutatis mutandis*) to

lunatic asylums established in boroughs ; also, the boroughs may, and in certain cases must, unite with the county in which they are situate, in the establishment and maintenance of an asylum. (16 & 17 Vict. c. 97, ss. 3, 9 ; 19 & 20 Vict. c. 87 ; 28 & 29 Vict. c. 80 ; 51 & 52 Vict. c. 41, ss. 3, 32, 36, 86.)

separately or in union with such other parties as in the Acts mentioned in that behalf (*e*),—the expenses of such an asylum being defrayed out of the county rates (*f*), and the management of them being vested in a *committee of visitors*, elected yearly by the justices, or (in case of union with some other asylum supported by voluntary subscriptions) partly by the justices and partly by the subscribers (*g*). The provision, enlargement, maintenance, management, and visitation of such asylums is part of the business which by the Local Government Act, 1888 (*h*), s. 3, was transferred to the administrative councils created by that Act; and such councils are constituted the “local authority” (*i*) charged, by the Lunacy Act, 1890, with the provision and maintenance of county and borough asylums (*k*).

These lunatic asylums (otherwise called pauper lunatic asylums) are supplementary, in a sense, to the administration of the poor law; and they became necessary after the provision of the Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76,) s. 45, whereby it was made penal to confine any insane person, having dangerous tendencies, for more than fourteen days, in any workhouse; and it was expressly provided, by the 25 & 26 Vict. c. 111, s. 20, that no lunatic whatever should be detained in the workhouse for more than that period, unless under a certificate from the proper medical officer; and under the 53 Vict. c. 5, s. 24, a justice’s order was in such cases necessary, for the lunatic’s longer detention there; but under the 54 & 55 Vict. c. 65, s. 4, this order is no longer required; also (by the 53 Vict. c. 5, s. 25), pauper lunatics discharged from asylums, hospitals, or licensed houses, may, in proper cases, be detained as lunatics in workhouses for indefinite periods.

(*e*) 16 & 17 Vict. c. 97, s. 3.

(*f*) Sect. 46.

(*g*) Sect. 22.

(*h*) 51 & 52 Vict. c. 41.

(*i*) 53 Vict. c. 5, s. 239.

(*k*) *Ibid.* s. 238.

The provisions of the earlier Acts for the reception of pauper lunatics into asylums were briefly as follows:—Any relieving officer of a parish within a union, or under a board of guardians,—and every overseer of a parish where there was no relieving officer,—who had knowledge (by notice from the medical officer or otherwise) that any pauper resident in such parish was deemed to be a lunatic, might give notice thereof to some justice of the county, who thereupon made an order for the pauper to be brought before him or before some other justice of the county; and the justice before whom the pauper was brought called to his assistance a physician, surgeon, or apothecary; and if, upon examination of the pauper, the medical man signed a certificate, to the effect that the pauper was a lunatic and a proper person to be taken charge of,—the justice, if satisfied, upon view or other proof, that such was indeed the fact, made an order, directing the pauper to be received into the asylum of that county (*l*); or, under special circumstances, into some other asylum, or into a hospital or house for lunatics (*m*), such hospital or house being a duly registered hospital or a duly licensed house (*n*). Also, any justice, acting upon his own knowledge, and without any notice as above, might examine any pauper deemed to be a lunatic, at his own abode or elsewhere; and, after such examination, might proceed in all respects as if the pauper had been brought before him in the more formal way (*o*). And if a pauper deemed to be a lunatic could not, on account of his health or other cause, be conveniently taken before any *justice* for examination, he might have been examined at his own abode or elsewhere, by some clergyman officiating in the parish, in company with the relieving officer (or overseer); and in such case, the order for his reception

(*l*) 16 & 17 Vict. c. 97, s. 67; 25 & 26 Vict. c. 111, ss. 19—28.

(*m*) 16 & 17 Vict. c. 97, s. 67.

(*n*) 8 & 9 Vict. c. 100, ss. 14—17, 43.

(*o*) 16 & 17 V ct. c. 97, s. 67.

into an asylum might have been made, conjointly, by such clergyman and relieving officer or overseer (*p*) ; but as regards pauper lunatics so circumstanced, they may no longer apparently be received into any asylum, hospital, or licensed house under a reception order signed by such officiating clergyman and overseer or relieving officer (*q*), but only on a “reception order” or “summary reception order” of a justice (*r*) ; or else of the chairman of the board of guardians, if duly authorized by the Lord Chancellor to sign such reception order (*s*) : and a justice is now, in no case, to sign such reception order for an alleged pauper lunatic, without first satisfying himself, that the alleged pauper either is in receipt of relief or is in such circumstances as to require relief (*t*).

Besides pauper lunatics, any lunatic (whether resident in the county or not) who, on examination by two justices, (assisted by a medical man,) was found to be *meditating* crime (*u*), might be sent to and detained in the county (or borough) asylum ; and now, under the provisions of the 53 Vict. c. 5 (*x*), lunatics (not being pauper lunatics) who are not under proper care or control, or who are cruelly treated or neglected by the person having charge of them, may (on the sworn information of a constable, relieving officer, or parish overseer) be personally visited by a justice, who shall authorize and direct two medical practitioners to visit and examine them, and to certify as to their mental condition ; and the justices may in a proper case, and on the certificates of such medical practitioners, cause the lunatic to be confined either in a pauper asylum or in a hospital or licensed house, unless the person in charge of the lunatic satisfies the justice that he will take proper

(*p*) 16 & 17 Vict. c. 97, s. 67.

(*q*) 53 Vict. c. 5, ss. 14, 16, 315.

(*r*) *Ibid.* s. 13.

(*s*) 54 & 55 Vict. c. 65, s. 25.

(*t*) 53 Vict. c. 5, s. 18.

(*u*) 1 & 2 Vict. c. 14 ; *Whitfield's*

Case, 15 Q. B. D. 122.

(*x*) See also 54 & 55 Vict. c. 65, s. 2 (2).

care of him ; and to the reception order in such cases, the medical certificates are now to be attached (*y*).

The earlier Acts also provided for the admission into the lunatic asylum of any county (or borough), of the pauper lunatics of any other county or borough, or even of lunatics who were not paupers (*z*) ; but as regards lunatics who were not paupers, the visitors might prescribe, as a condition of their admission, that the person applying for the admission should give an undertaking to pay for the lodging, maintenance, and other necessities to be provided for the lunatic in the asylum ; and these provisions are maintained in the Lunacy Act, 1890 (*a*).

As regards pauper lunatics, every pauper lunatic is of course chargeable to the poor rates, being the poor rates of the parish from which he is sent, or of other the parish to which he belongs (*b*) ; or (if the parish forms part of a union) the charge falls on the *common fund* of the union ; and in case the pauper's settlement cannot be ascertained, the charge falls upon the county at large in which he is found (*c*). And by the Local Government Act, 1888 (*d*), the administrative councils established under that Act are required to provide (to the extent specified in the Act) for all pauper lunatics, according to their chargeability, partly out of the Exchequer Contribution Account spoken of in a former chapter (*e*), and partly out of the general rates for the administrative county ; but under the Lunacy Act, 1890, any property of the lunatic, if more than sufficient for the maintenance of his family, may, by order of a justice (sect. 299), or of a county court judge (sect. 300), be made available to recoup the expenses of his maintenance.

(*y*) 54 & 55 Vict. c. 65, s. 5.

(*z*) 16 & 17 Vict. c. 97, s. 43.

(*a*) 53 Vict. c. 5, ss. 269—271.

(*b*) Sects. 286—298 ; *Finch v.*

York Union, 2 Q. B. D. 15.

(*c*) *The Queen v. Medway Union*,
Law Rep. 3 Q. B. 383.

(*d*) 51 & 52 Vict. c. 41, ss. 3, 24,
32, 36, 38, and 86.

(*e*) *Supra*, p. 38.

As from the 1st day of May, 1890, fuller and more specific provision has been made, by the Lunacy Act, 1890, already referred to, against the wrongful detention of persons as lunatics, it being enacted by that Act, that as regards lunatics (other than the criminal lunatics herein-after referred to, and other than pauper lunatics and lunatics wandering at large, and lunatics so found by inquisition), no person shall, excepting in cases of urgency, be received or detained as a lunatic in any asylum, hospital, or licensed house, or as a single patient, unless under the reception order of a county court judge or magistrate or justice of the peace (*f*),—which order is to be obtained on petition accompanied by two medical certificates under the hands of two medical practitioners (sect. 4); and the judge, magistrate, or justice may himself visit the alleged lunatic to satisfy himself as to the lunacy (sect. 6); and the reception order, when made, and when it has the medical certificates attached thereto as before mentioned, is a sufficient authority (within seven clear days from its date) for the petitioner to take the lunatic to, and for his reception and detention in, the place mentioned in the order (sect. 36); also, in cases of urgency, the lunatic may be received and detained under an “urgency order” made at the request of the husband, wife, or other near relative of the lunatic, the request being accompanied with a medical certificate under the hand of a medical practitioner, who has personally examined the lunatic within two days before signing such certificate. (sect. 11). But the Act gives the lunatic the right of appealing in certain cases against the order for his reception or detention (sect. 8), such appeal being to another judge, magistrate, or justice; and the Act contains also minute provisions for the protection of persons from being wrongfully confined as lunatics by their near relatives by blood or marriage; and, with a view to ascertaining

(*f*) Being one of the committee appointed for this purpose by the justices of the county or quarter sessions borough. (Sect. 10.)

whether or not the detention of persons as lunatics is in the first instance lawful, the Act specially provides, that within one month after the reception of a lunatic the medical superintendent, medical proprietor, or medical attendant, as the case may be, who has him in charge, shall report as to his mental and bodily condition to the Commissioners in Lunacy (sect. 39) ; and thereupon those Commissioners (or one or more of them) are to visit the lunatic ; and the Visitors in Lunacy are also to visit him if he is detained as a private patient in a licensed house within their district (sect. 29) ; and thereupon, according to the true state of the alleged lunatic, he may be either discharged from or continued in detention (sect. 39). The Act also provides, that reception orders shall in general continue good for one year only, but may (where necessary) be continued for two years, and be further continued for three years, and be further continued for five years, and afterwards be continued for successive periods of five years (sect. 38) ; and these orders are now continued and successively continued for the periods aforesaid automatically.—that is to say, merely upon the medical officer or medical attendant who has the lunatic in his charge specially reporting to the Commissioners from time to time, as prescribed, that the lunacy still continues (*g*) ; but the Commissioners may, at any period of the detention of the lunatic, visit him, and if he is detained without sufficient cause, they may order his discharge (sect. 38). Also, any one, whether a relative or not of the alleged lunatic, may obtain an order from the Commissioners for the examination of the lunatic by two medical practitioners authorized by the Commissioners ; and on the certificate of such practitioners, the Commissioners may in a proper case order the discharge of the alleged lunatic (sect. 49) ; and any alleged lunatic (being a pauper lunatic) may, in a proper case, and upon an order of the committee of visitors,

be delivered over to his relatives or friends willing to take care of him (sect. 57) ; and these latter may in such case receive an allowance from the poor law authority towards the cost of his maintenance. The Act also provides, that lunatics detained by persons receiving no payment therefor, or deriving no profit therefrom, or who are detained in charitable or other like institutions (not being asylums, hospitals, or licensed houses), may be discharged or removed to an asylum, hospital, or licensed house, by order of the Lord Chancellor, upon a report as to their condition transmitted to the Lord Chancellor by the Commissioners (sect. 206). And there are also many other provisions contained in the Act which have for their object the comfort and humane treatment of lunatics during the period of their detention (*h*), including the proper management of asylums, hospitals, and licensed houses, and their enlargement when necessary ; and in case a lunatic who is lawfully detained escapes, he may be retaken in England, Scotland, or Ireland, on the warrant of a justice of the peace, to be obtained by any person in that behalf authorized by the Commissioners (sects. 85—89).

II. CRIMINAL LUNATICS.—The Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), which repeals and consolidates (with amendments) the earlier general Acts upon the subject, and which were called the Criminal Lunatics Acts, 1840 to 1869 (*i*), has enacted, that where it appears to any two members of the visiting committee of a prison that a prisoner in such prison (not being under sentence of

(*h*) Female (and not male) attendants are to have the personal charge of female lunatics (sect. 53), unless in cases of urgency ; and having carnal intercourse with any such lunatic, whether she consent or not, is an offence punishable

with imprisonment, for two years, with or without hard labour. (Sect. 324.)

(*i*) 3 & 4 Vict. c. 54 ; 27 & 28 Vict. c. 29 ; 30 & 31 Vict. c. 12 ; and 32 & 33 Vict. c. 78

death) is insane, they shall call to their assistance two legally qualified medical practitioners, to examine the prisoner and inquire as to his insanity ; and after such examination and inquiry, they may certify in writing that the prisoner is insane. As regards any prisoner who is under sentence of death, if it appears to the secretary of state, either by means of a certificate signed by two members of the visiting committee of the prison in which such prisoner is confined, or by any other means, that there is reason to believe such prisoner to be insane, the secretary of state is to appoint two or more legally qualified medical practitioners to examine the prisoner and inquire as to his insanity ; and after such examination and inquiry, they report in writing to the secretary of state as to the sanity of the prisoner, and certify or not that he is insane ; and in case they certify that he is insane, the secretary of state may thereupon, if he thinks fit, issue his warrant for the removal of such prisoner to the asylum named in the warrant, and the prisoner is to be received into such asylum accordingly ; and, subject to the provisions of the Act relating to his conditional discharge and otherwise, he is to be detained therein, or in any other asylum to which he may be transferred in pursuance of the Act, as a criminal lunatic, until he ceases to be a criminal lunatic (*k*). Should the criminal lunatic at any time afterwards be certified to have become sane, he is to be remitted to prison, by warrant of the secretary of state, there to complete his sentence (*l*) ; but as regards any such criminal lunatic found to have been insane at the date of the commission of the offence, the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), s. 2, has now provided, that, the jury having first returned a special verdict to that effect, the court shall order the accused to be kept in custody as

(*k*) 47 & 48 Vict. c. 64, ss. 2, 10 ; *peter Union*, *ib.* 7 C. P. 366 ; *The Bradford Union v. Wilts*, Law Queen v. Lewes, *ib.* 7 Q. B. 579.
Rep. 3 Q. B. 604 ; *Pegge v. Lam-* (*l*) 47 & 48 Vict. c. 64, s. 3.

a criminal lunatic, in such place as the court shall direct, during her Majesty's pleasure.

The proper prison for persons removable under the provisions of the Acts relating to criminal lunatics, is some asylum appropriated by law for the custody and care of such criminals as shall become insane during their imprisonment, or of such persons as shall be acquitted at their trial on the ground of insanity, under the 39 & 40 Geo. III. c. 94 (*m*); for the 23 & 24 Vict. c. 75 (amended by the 47 & 48 Vict. c. 64) has enacted, that her Majesty may, from time to time, by warrant under her royal sign manual, appoint that any asylum or place in England which has been provided for the purpose, shall be an *asylum for criminal lunatics*; and that the secretary of state may from time to time appoint a council of supervision thereof, and also a resident medical superintendent, chaplain, and such other officers and servants as he shall think necessary, and shall frame such rules for its guidance and management, as may be required (*n*). The secretary of state may also, at any time, order the discharge of any such criminal prisoner, either absolutely or on conditions; and if the conditions be broken, may cause the prisoner to be recaptured (*o*); and he may also permit any such criminal prisoner to be absent on trial, from his place of confinement, on such conditions as he may think fit. The Act contains also provisions for the contingency of the term of punishment awarded to any criminal, who shall become lunatic, expiring before he recovers the use of his reason (*p*); and also provisions for the care of such criminal lunatics as shall be or become pauper lunatics (*q*).

III. THE TREATMENT OF LUNATICS AND OF IDIOTS.—
The provisions which have been made to secure the proper

(*m*) *Vide post*, bk. vi.

(*n*) 23 & 24 Vict. c. 75, s. 2.

(*o*) 47 & 48 Vict. c. 64, s. 5.

(*p*) 46 & 46 Vict. c. 64, s. 6.

(*q*) Sect. 7.

treatment of lunatics in general may be stated as follows :—In addition to the provisions of the 53 Vict. c. 5, above stated, regulating their original reception and subsequent detention, and providing against their wrongful confinement, and for their humane treatment during their lawful confinement, it has been provided by the same Act, repealing but re-enacting the like provisions contained in the 8 & 9 Vict. c. 100, 16 & 17 Vict. cc. 96, 97, and 25 & 26 Vict. c. 111, that it shall be a *misdemeanor* for any person to receive two or more lunatics into any house (not being a county or borough lunatic asylum), which is not •either a hospital duly registered, or some house duly licensed for the reception of lunatics (*r*) ; but *one* lunatic may be so received (*s*). And hospitals wherein lunatics are to be received, must be registered with the sanction of the commissioners of lunacy (a board of persons comprising medical men and barristers, originally established by the 8 & 9 Vict. c. 100, s. 3, and which has been continued by the Lunacy Act, 1890, s. 150) ; and *licences* for keeping houses for such purpose are granted by the same commissioners, at a quarterly or special meeting of the board, for Middlesex, London, Westminster, Southwark, and all places within the range of seven miles from any part of London, Westminster, or Southwark ; and, in other places, licences for keeping such houses (the houses having been first inspected by the commissioners) may be granted by the justices in general or quarter sessions assembled (*t*) ; but the licence is in no case to be for a period exceeding thirteen calendar months, and must therefore be periodically renewed (*u*). The Lunacy Act, 1890, contains also minute and specific provisions, for the effectual superintendence of all such registered hospitals and licensed houses ; requiring, *e.g.*, that the keepers of such hospitals

(*r*) 53 Vict. c. 5, s. 315.

(*s*) *Ibid.*

(*t*) 53 Vict. c. 5, s. 208, and 3rd Schedule.

(*u*) Sects. 207, 216.

and houses shall report the admission, death, removal, discharge, or escape of any patient, and shall provide the patients with proper medical attendance (*x*) ; also, that all such patients shall be visited by the commissioners, or (in the country) by special visitors appointed by the magistrates (*y*), and that special visits may in particular cases be directed (*z*) ; and that reports shall be made by the visitors to the commissioners, and by the commissioners to the lord chancellor, of the state of the several houses visited by them, and as to the care taken of the patients therein (*a*). Moreover, a person detained in a licensed house or hospital without sufficient cause may be directed by the commissioners to be set at liberty (*b*) ; but this power does not, of course, extend to enabling the commissioners to order the discharge of a person found lunatic under a *commission* ; or who is in confinement by order of the secretary of state, or under the order of any court of criminal jurisdiction. The commissioners may also visit all *asylums* and *gaols* and *workhouses* where any lunatics are confined, and inquire into the condition, system, and regulations of such asylums, gaols, and workhouses ; and in the case of workhouses, they report thereon to the Local Government Board. And generally, the lord chancellor, in the case of lunatics under the care of committees, and either the lord chancellor or the home secretary, in the case of other persons under restraint as lunatics, may direct the commissioners or any special commissioner to visit the lunatic, and to inquire into such matters as are directed by the order, and to report to him the result of the inquiry.

And as regards *idiots*,—as distinguished from *lunatics*,—specific provision has also now been made, for their

(*x*) 53 Vict. c. 5, ss. 43—52.

(*y*) Sects. 163—168, 169—176,
and 177—182.

(*z*) Sect. 204.

(*a*) Sects. 162, 184.

(*b*) Sects. 72—78.

reception in such registered hospitals and licensed houses ; the Idiots Act, 1886 (49 Vict. c. 25), having enacted, that idiots under age may be received into, and until they attain twenty-one years of age may be detained in, such places (being first duly registered under the Act), on the certificate in writing of a duly qualified medical practitioner, accompanied with a statement, of the idiot's parent or guardian, certifying as to his general condition and treatment ; and such idiots may, with the written consent of the commissioners in lunacy, be retained in such places after they have attained the age of twenty-one years ; and idiots who have already attained that age may be received into and detained in such places, on the like certificate and statement. And for securing the proper treatment of idiots while so detained, the provisions in that behalf applicable to lunatics confined in such places, and which have been hereinbefore stated with some detail, are,—that is to say, the like provisions are,—with but few exceptions, applicable also to idiots detained therein,—the provisions of the Idiots Act, 1886, in these particulars not having been affected in any way by the Lunacy Act, 1890 (*c*).

(*c*) 53 Vict. c. 5, s. 340.

CHAPTER VI.

OF THE LAWS RELATING TO PRISONS.

A PRISON may not be erected, save by the authority of parliament (*a*) ; and when once erected, it belongs to the sovereign (*b*), as representing the executive government of the country. Moreover, the gaoler, governor, keeper, or other chief officer of a prison was formerly, in contemplation of law, considered merely as the deputy of the sheriff of the county or place in which the prison was situate ; and consequently, if he negligently suffered a prisoner to escape out of his custody, the sheriff (as his principal) was held responsible ; but under the existing law, every prisoner is deemed to be in the legal custody of the gaoler himself, so that the sheriff is no longer liable for his escape (*c*).

There is a species of prison which is termed, by way of distinction from a gaol properly so called (or common gaol), a house of correction, or (in the city of London) a bridewell, and sometimes a penitentiary (*d*). And regarding houses of correction, it is to be observed, that they were established in the reign of Elizabeth, and were originally designed for the penal confinement (after conviction) of paupers refusing to work, and of other persons falling under the legal description of *vagrants* (*e*) ; and at first this was the only purpose for which houses of correction

(*a*) 2 Inst. 705 ; Bac. Abr. Gaol.
(A.) ; *R. v. Justices of Lancashire*,
11 Ad. & Ell. 144.
(*b*) 2 Inst. 589.

(*c*) 28 & 29 Vict. c. 126, s. 58 ;
40 & 41 Vict. c. 21, s. 31.
(*d*) 28 & 29 Vict. c. 126, s. 4.
(*e*) 39 Eliz. c. 4.

might be used, the common gaol having then been the only legal place of commitment for persons convicted of offences or awaiting their trial (*f*'). However, by the 5 & 6 Will. IV. c. 38, ss. 3, 4, it was enacted, that either a justice of the peace, or a coroner, might, as regards prisoners awaiting their trial, commit them for safe custody, to any house of correction situate near the place where the assizes or sessions were to be held, at which they were to be tried ; and subsequently " police stations " and " lock-up " houses were successively established, for the temporary detention of persons charged with offences (*g*),—it being, however, provided, by the 14 & 15 Vict. c. 55, ss. 20, 21, that every prisoner committed in the first instance otherwise than to the common gaol should be, in due course, removed to the common gaol to take his trial. The importance of the distinction between gaols and houses of correction has, however, now been in a great measure done away with, by the Prison Act, 1865 (28 & 29 Vict. c. 126), which enacts, that (subject to the provisions of that Act with respect to the appropriation of prisons to different classes of prisoners) every prison to which the Act applies shall be deemed to be both a gaol and a house of correction (*h*) ; and the Prison Act, 1877 (40 & 41 Vict. c. 21) gives the secretary of state a general authority to appoint the particular prisons in which prisoners shall be confined, both before and during their trial, and after conviction (*i*) ; moreover, prisoners may be removed from one prison to another, for the purposes of their trial (*k*).

The maintenance and government of prisons is now mainly provided for by the Prison Acts, 1865 and 1877,

(*f*') 5 Hen. 4, c. 10 ; 23 Hen. 8, c. 2 ; 6 Geo. 1, c. 19.

(*g*) 5 & 6 Vict. c. 109 ; 11 & 12 Vict. c. 101 ; 13 & 14 Vict.

c. 20 ; 28 & 29 Vict. c. 126 ; 31 & 32 Vict. c. 22.

(*h*) 28 & 29 Vict. c. 126, s. 56.

(*i*) 40 & 41 Vict. c. 21, ss. 24, 25.

(*k*) 29 & 30 Vict. c. 100.

just referred to, and by the Prison Acts, 1884 and 1898 (47 & 48 Vict. c. 51, and 61 & 62 Vict. c. 41), by which four Acts the statute law on this subject has been consolidated and amended. And, by the Prison Act, 1865, every place having a separate prison jurisdiction (*i.e.*, speaking roughly, every county, riding, hundred, liberty, borough, or town) is placed under the legal liability of providing, at its own expense, adequate accommodation for its own prisoners; and the duty of seeing that this result is attained is entrusted to the *prison authority*,—that is to say, to the justices of the county, the council of the borough, or otherwise, as the case may be (*l*); and this duty has now devolved upon the county council created by the Local Government Act, 1888 (*m*). And the Prison Act of 1865 (as amended by the subsequent Prison Acts) makes careful provision for the spiritual wants of the prisoners during the period of their incarceration, enacting that there shall be appointed a chaplain and (if thought necessary) an assistant chaplain for each prison, being respectively clergymen of the Established Church, and duly licensed in that behalf by the bishop (*n*); and either a chapel, or a room suitable for the purposes of a chapel, is to be provided in every prison, in which prayers (selected from the liturgy of the Established Church) and portions from the Scriptures may be read daily, either by the chaplain himself, or by the gaoler, or by some other person selected for the purpose (*o*); and to meet the spiritual wants of such prisoners as do not belong to the Established Church, a minister of the persuasion to which such prisoners belong may be appointed, and a reasonable

(*l*) 28 & 29 Vict. c. 126, s. 5.
A place has a "separate prison jurisdiction" which either in fact maintains, or (but for other accommodation being provided for it) would be liable at law to maintain,

a separate prison for itself. (Sect. 9.)

(*m*) 51 & 52 Vict. c. 41, s. 3.

(*n*) 28 & 29 Vict. c. 126, ss. 10, 13.

(*o*) Sched. I., Nos. 44, 45.

recompense awarded to him for his services (*p*) ; and the prisoners are required to attend at the celebration of divine service, and such of them as desire it may receive religious and moral instruction. And as regards generally the management of prisons, and their maintenance, and the discipline to be exercised by the prison officials over the prisoners, very exact and minute provisions have been laid down in the Prison Acts, more particularly in the Prison Acts, 1865, 1877, and 1898 ; and, by the Act of 1877, it has been specifically enacted, that, for the future, all the expenses incurred in the maintenance of those prisons to which the Act applies (that is to say, all prisons which belong to any “ prison authority ” as defined by the Act of 1865), as well as the expense of keeping the prisoners therein, shall be defrayed out of moneys to be provided by parliament, instead of as theretofore by local rates ; and the continuance or discontinuance of any particular prison or prisons, the appointment of all prison officers, the control and safe custody of the prisoners, and all powers and jurisdictions exerciseable by prison authorities, or by the justices in sessions assembled, in relation to prisons within their jurisdiction, are thereby entrusted or transferred to the secretary of state (*q*). And to assist the secretary of state in the due execution of this part of his office, the Act of 1877 has established a Board of Prison Commissioners, in whom (subject to his control) the general superintendence of all prisons under the Act is vested ; and such commissioners are now, by virtue of their office, *directors of convict prisons* (*r*) ; and they are to be assisted by inspectors and other officers (*s*) ; and the Commissioners, either by themselves or by their officers, are to visit and inspect the different prisons ; and are to examine into the

(*p*) Sched. I., No. 47 ; Sched. III.

(*r*) 61 & 62 Vict. c. 41, s. 1.

(*q*) 40 & 41 Vict. c. 21, ss. 4, 5 ;

(*s*) 40 & 41 Vict. c. 21, ss. 6, 7 ;

Mullins v. Treasurer of Surrey,

61 & 62 Vict. c. 41, s. 1.

6 Q. B. D. 156.

state of the buildings, the conduct of the officers, the treatment and conduct of the prisoners, their labour and earnings (*t*), and similar matters, including an inquiry into all alleged abuses; and to these commissioners are also transferred the specific powers and jurisdictions conferred upon “visiting justices” either at common law or by charter or statute; and they are to make from time to time reports as to each prison to the secretary of state; and their annual report is to be laid before both houses of parliament (*u*). And under the Prison Act, 1884, the secretary of state may, with the approval of the Treasury, alter, enlarge, or rebuild any prison; or build any new prison; or appropriate for a new prison any building or part thereof vested in him (*x*); and thereupon may declare such new prison to be a prison under the Prison Acts, and to be within the jurisdiction of the prison commissioners, and to be a prison for the county, or other the prison jurisdiction, named in the declaration.

The Act of 1898 regulates the corporal punishment which may be inflicted on convict prisoners for prison offences; and enacts, that such punishment shall not be inflicted (unless for mutiny or incitement to mutiny, or unless for gross personal violence to any prison official) in any cases save two, viz., (1) in the case of offences committed by prisoners who have been convicted of felony, or who have been sentenced to penal servitude or to hard labour; and (2) in the case of offences duly established

(*t*) Prison-made goods interfere, to some extent, with the sale of goods manufactured out of prison; and goods made in foreign prisons may therefore be excluded from importation (60 & 61 Vict. c. 63).

(*u*) 40 & 41 Vict. c. 21, s. 10. The “visiting justices” appointed by the Prison Act, 1865, are now

represented by the “visiting committee of justices”; and the visiting committee exercise such duties as are from time to time prescribed by the secretary of state (40 & 41 Vict. c. 21, ss. 13—15.)

(*x*) Sect. 2.

after a fair trial before a special tribunal appointed for the purpose (*y*). And the Act contains also provisions for the separation of prisoners of different degrees or qualities (*z*),—not being prisoners who have been sentenced to penal servitude or to hard labour; and it enacts, that prisons need not have punishment cells, but only special cells for the temporary confinement of refractory or violent prisoners (*a*),—and it contains some few other provisions of the like humane character.

Besides the prisons to which the Prison Acts apply, and besides military and naval prisons (*b*), there are some particular prisons, which may here be noticed,—as being (or as having been) the subjects of separate statutory regulation, that is to say :—

1. MILLBANK PRISON.—This prison was formerly called “The Penitentiary at Millbank,” and was used for the temporary reception of convicts (male and female) under sentence of penal servitude, including occasionally military offenders (*c*); and although locally situated within their jurisdiction, the justices for Middlesex or Westminster had no authority over it (*d*). By the 13 & 14 Vict. c. 39, this prison was placed under a board of three persons, appointed by the secretary of state,—and established as a body corporate, by the name of “The Directors of Convict Prisons” (*e*); and they (with his approbation) used to

(*y*) 61 & 62 Vict. c. 41, s. 5.

(*z*) Sect. 6.

(*a*) Sect. 7.

(*b*) 28 & 29 Vict. c. 26, s. 3.

(*c*) 6 & 7 Vict. c. 26; 11 & 12 Vict. c. 104; 13 & 14 Vict. c. 39; 32 & 33 Vict. c. 95,—all now repealed by 55 Vict. c. 1.

(*d*) 6 & 7 Vict. c. 26, s. 8.

(*e*) These directors still superintend, visit, and report upon such other prisons, used for the confine-

ment of offenders under sentence of penal servitude, as by Order in Council in that behalf appointed; and these now include the prisons at Pentonville, Borstal, Brixton, Chatham, Dartmoor, Parkhurst, Portland, Portsmouth, Woking, Fulham, and Wormwood Scrubs. (5 Geo. 4, c. 84, s. 10; 13 & 14 Vict. c. 39; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3; 39 & 40 Vict. c. 42.)

make regulations for the government of the prison, and yearly reported to him as to all matters relating to the prison or to the convicts; and their reports were laid before both houses of parliament (*f*); and the secretary of state also appointed for the prison, a governor, a chaplain, a medical officer, a matron, and such other officers as he deemed necessary (*g*). But the prison at Millbank has now ceased to be used as a prison; and the site thereof having belonged to the crown, it has, by the 55 Vict. c. 1, been transferred to her Majesty's Commissioners of Works (*h*); and by them, has been duly appropriated—in part for the erection of artisans' dwellings, and in part for other public purposes.

2. PARKHURST PRISON.—This prison was established for the confinement and correction of *young* offenders (male or female) as well those under sentence of penal servitude, as also those under sentence of imprisonment (*i*). The regulations for this prison (which is in the Isle of Wight) are made under the sanction of the secretary of state, and are laid before parliament; and they may include the power to inflict corporal punishment for misconduct while in prison,—subject, however, to the restrictions (above referred to) contained in the Prison Act, 1898. The secretary of state appoints a governor, chaplain, surgeon,

(*f*) 6 & 7 Vict. c. 26, ss. 10, 11; 13 & 14 Vict. c. 39, s. 1.

(*g*) 6 & 7 Vict. c. 26, s. 5.

(*h*) The 48 & 49 Vict. c. 72, provides, that on the removal from their present sites of Millbank Penitentiary or Pentonville Penitentiary, the Queen may, on the recommendation of the Treasury,—and that, on the removal from its present site of Coldbath Fields Prison, or of the Clerkenwell House of Detention, the

justices of the peace for the county of Middlesex may,—sell and convey those respective sites, or any part or parts thereof, to the Metropolitan Board of Works, at a “fair market price,”—the object being to furnish sites for the construction of convenient artisans' dwellings.

(*i*) 1 & 2 Vict. c. 82; 5 & 6 Vict. c. 98, s. 12; 20 & 21 Vict. c. 3, s. 3.

and matron, and all other necessary officers. This establishment also is placed, by the 13 & 14 Vict. c. 39, under the superintendence of the “Directors of Convict Prisons”; who, if they discover any abuses, are to report the same to the secretary of state; and they are required, also, to report to him as to the state and condition of the prison; and such report is submitted to parliament (*k*).

3. PENTONVILLE PRISON.—This prison was established originally for the temporary confinement of male convicts under sentence of penal servitude (*l*); but it is now used as an ordinary prison. This prison also is placed, by the 13 & 14 Vict. c. 39, under the superintendence of the “Directors of Convict Prisons”; and power is conferred on these directors, with the approbation of the secretary of state, to make rules to be observed therein (*m*), and to appoint officers,—comprising a governor, a chaplain, a medical officer, and such other officers as may be found necessary (*n*). And the directors are from time to time to appoint one or more of themselves to visit the prison during the intervals between their meetings; and they may delegate to such visitor or visitors the power of making orders in cases of pressing emergency (*o*); and the directors report to the secretary of state as to all matters relating to the prison, its discipline and management; and such reports are laid before parliament (*p*). And by the 61 & 62 Vict. c. 41, s. 3, the secretary of state is now required to appoint for every convict prison a “Board of Visitors,”—and not less than two members of this board must be justices of the peace.

(*k*) 1 & 2 Vict. c. 82; 13 & 14 Vict. c. 39.

(*l*) 5 & 6 Vict. c. 29, ss. 14, 16; 16 & 17 Vict. c. 99, s. 6; 20 & 21 Vict. c. 3, s. 3.

(*m*) 5 & 6 Vict. c. 29, s. 9.

(*n*) Sect. 6.

(*o*) Sect. 10.

(*p*) Sect. 13.

CHAPTER VII.

OF THE LAWS RELATING TO HIGHWAYS—AND HEREIN OF
BRIDGES AND TURNPIKE ROADS.

HIGHWAYS are those public roads which all the subjects of the realm have a right to use. The soil of such roads (equally as in the case of private roads) is, by presumption of law, in the adjoining owner on either side of the road, *usque ad medium filum viæ* (a) ; but the presumption may of course be rebutted (b). The term highway includes also (but for some purposes only) those roads or ways, *e.g.*, church paths, which are common to the inhabitants of some particular parish or district only (c) ; and a road may be a public road or highway, although it should not be a thoroughfare (d). The highways or public roads, now in use throughout the country, have in general either existed by prescription (that is, from time immemorial), or have been constructed under the authority of local Acts of Parliament. In some cases, however, they appear to have originated in the dedication of the owner of the soil over which they pass ; for such owner may, if he think fit, *expressly* dedicate a way over his land to the use of the public ; and if he permit strangers for a long period to pass over it, at their free will and pleasure, and without molestation, that will (or may) amount to an *implied*

(a) *Berridge v. Ward*, 10 C. B. (N.S.) 400 ; *Holmes v. Bellingham*, 7 C. B. (N.S.) 329.

(b) *Beckett v. Corporation of Leeds*, Law Rep., 7 Ch. App. 421 ;

Leigh v. Jack, 5 Exch. D. 264 ; *Pryor v. Petre*, [1894] 2 Ch. 11.

(c) 5 & 6 Will. 4, c. 50, s. 5.

(d) *Bateman v. Bluck*, 18 Q. B. 870.

dedication (*e*) ; and such dedication, whether express or implied, may be either absolute (as it usually is), or subject to some qualification or to some pre-existing right of user (*f*).

The parish is, of common right, bound (as a general rule) to keep in repair any highway within its boundaries, whatever may have been the origin of the road ; but, in some cases, the liability to repair attaches (by prescription) to a particular township, or other division of the parish (*g*). The liability also attaches, occasionally, to the private occupier of lands, as where he is bound to repair the highway in right of his estate, *i.e.*, *ratione tenuræ* (*h*),—in which latter case, such occupier may claim (by grant or prescription) from those who use the road a toll of that species which is called a *toll traverse* (*i*), being a toll taken for passage over the soil of a private owner ; as distinguished from a *toll thorough*, which latter toll is the toll sometimes taken for passing along or over a highway or public road (*j*). Moreover, the liability to repair *ratione clausuræ* an ancient highway running through hitherto uninclosed lands, may attach to the occupier, by reason of his enclosing the lands and thereby depriving the public of their immemorial right to deviate thereon when the highway is *fouderous* (*i.e.*, out of repair) (*k*).

(*e*) *Poole v. Huskinson*, 11 Mee. & W. 827 ; *The Queen v. Petrie*, 4 Ell. & Bl. 737 ; *Dawes v. Hawkins*, 8 C. B. (N.S.) 848 ; *The Queen v. Bradfield*, Law Rep., 9 Q. B. 552.

(*f*) *Poole v. Huskinson*, *supra* ; *Morant v. Chamberlin*, 6 H. & N. 541 ; *Grand Junction Canal Co. v. Petty*, 21 Q. B. D. 273.

(*g*) *The Queen v. Ardsley (Inhabitants)*, 3 Q. B. D. 255.

(*h*) 3 Geo. 4, c. 126, s. 107 ; 5 & 6 Will. 4, c. 50, s. 62 ; *R. v. East-ridington*, 5 A. & E. 765 ; *R. v.*

Heage, 2 Q. B. 128 ; *The Queen v. Ramsden*, 1 Ell. Bl. & Ell. 949.

(*i*) Com. Dig. Toll ; Willes, 115 ; *Brett v. Beales*, 10 B. & C. 508 ; *Lord Middleton v. Lambert*, 1 A. & E. 401.

(*j*) *R. v. Marquis of Salisbury*, 8 A. & E. 716.

(*k*) *Reg. v. Ramsden*, Ell. Bl. & Ell. 949. The liability *ratione clausuræ* does not now arise when the occupier of lands has obtained the consent in writing of the highway authority to the erection of fences (25 & 26 Vict. c. 61, s. 46).

The expense of maintaining bridges is defrayed (like that of roads) by the public,—this having been part of the *trinoda necessitas*, to which every man's estate was by the antient law subject, viz., *expeditio contra hostem, arcium constructio, et pontium reparatio* (*l*) ; but the burthen of such repair is, in general, not on the parish, but on the county at large in which the bridge is situate (*m*),—although an individual may be bound *ratione tenure* to repair the bridge (*n*) ; or some particular borough within the county may be liable, and not the county at large (*o*) ; and where (as is sometimes the case) a parish is bound by prescription to repair some particular bridge, the parish may contract with the county for the future repair of such bridge at the expense of the county (*p*). The liability of the county extended, at common law, not only to the bridge itself, but to so much of the road as passed over it, and to its ends or approaches ; and by the 22 Hen. VIII. c. 5, the county was made liable to repair three hundred feet either way from the bridge ; and such in general is still the law, as to the repair of bridges built prior to the Highway Act, 1835 (5 & 6 Will. IV. c. 50). But, by that statute, it was provided, that, in the case of all bridges *thereafter* to be built, the repair of the road itself passing over the bridge (together with the approaches thereto at either end) should be done by the parish, or other the parties bound to the general repair of the highways ; and that the county should remain subject to its former obligation, as regards only “ the walls, banks, or fences of the raised causeways, and “ *raised* approaches to any bridge, or the land arches “ thereof ” (*q*). And inasmuch as, before that statute, a

(*l*) 1 Bl. Com. 357.

(*m*) Viner's Abridg. Bridges (A); 43 Geo. 3, c. 59, s. 5 ; 41 & 42 Vict. c. 77, ss. 21, 22 ; *Re Newport Bridge*, 2 Ell. & Ell. 377.

(*n*) *Baker v. Greenhill*, 3 Q. B. 148 ; *The Queen v. Bedfordshire (Inhabitants)*, 4 Ell. & Bl. 535.

(*o*) 45 & 46 Vict. c. 50, s. 119.

(*p*) 22 Hen. 8, c. 5 ; *R. v. Hendon*, 4 B. & Ad. 628 ; *Howitt v. Nottingham Tramways Co.*, 12 Q. B. D. 16.

(*q*) 5 & 6 Will. 4, c. 50, s. 21 ; 41 & 42 Vict. c. 77, ss. 21, 22.

parish was liable for the repair of all roads within it, dedicated to and used by the public, although there had been no adoption of such roads by the parish (*r*),—therefore the Highway Act, 1835, as amended by later Acts, enacted, that no road, made at the expense of any individual or body corporate, should be a highway which the parish was liable to repair, unless three calendar months' notice should be given to the highway authority, of the intention to dedicate such road to the public (*s*) ; and where such notice was given, a vestry or district council (as the case may be) considered whether the road was of sufficient utility to justify its being kept in repair by the parish ; and in the event of the vestry or district council (as the case may be) thinking the road unnecessary, the justices, at the next special sessions for highways or in petty sessions, finally determined the matter ; and the Act contained also provisions for ensuring, that the road should be originally constructed in a proper and substantial manner, before the expense of repairing it was cast upon the parish (*t*).

Any parish, county, borough, or person, who is bound to repair either a road or a bridge, and who neglects the duty, is liable at common law to an indictment (*u*) ; and to such an indictment,—at least when laid against a parish,—the plea in defence must show, not merely that the parish is not liable, but that some other party is liable, for the repairs (*x*) ; and the justices may, and in some cases must, order an indictment to be preferred (*y*). But though each parish (or township or other particular district), through whose lands any portion of a highway passes, is liable by the general law of the land to maintain such portion, there are special provisions sanctioned by the legislature for keeping in repair some of the most frequented and important roads

(*r*) *R. v. Leake*, 5 B. & Ad. 469.

(*s*) 5 & 6 Will. 4, c. 50, s. 23.

(*t*) *Ibid.* ; *The Queen v. Thomas*,
7 Ell. & Bl. 399.

(*u*) *Reg. v. Turweston*, 16 Q. B.
109 ; *Reg. v. Inhabitants of Heanor*,

6 Q. B. 745 ; *The Queen v. Eyton*,
3 Ell. & Bl. 390.

(*x*) *Rex v. Eastington*, 5 A. & E.
765.

(*y*) *Reg. v. Arnould*, 8 Ell. & Bl.
550 ; 5 & 6 Will. 4, c. 50, s. 95.

of the kingdom. For many of such roads were formerly kept in order, (and some were originally constructed,) under the authority of local *Turnpike Acts* : by the effect of which, the management of such roads had been usually vested, for a certain term of years, in trustees or commissioners ; empowered by the Acts to erect toll-gates, and to levy tolls from those who pass through, as a fund for defraying the expenses of repairs or improvements ; and there was, therefore, a distinction between *highways in general* and *turnpike roads*. It is to be understood, however, that the collection of such tolls did not supersede the other means provided by the law for maintaining highways and bridges ; and therefore, if a turnpike road, or the bridge over which such road passed, was allowed by the trustees to fall out of repair, the parishes or other parties who would have been bound to repair it (supposing it not to have become the subject of a turnpike trust) were still, as a general rule, liable to that obligation (*z*) ; but under particular circumstances, they might be exempt from this duty to repair,—for the trustees of a turnpike road might, in certain cases, enter into a contract to repair exclusively, out of the trust funds ; and where such exclusive contract was in force, the persons originally liable were discharged from all responsibility (*a*). Also, when any turnpike road became again, by the determination of the turnpike trust, an ordinary highway, the balance of moneys (if any) in the hands of the trustees was paid over by them rateably amongst the parishes which, upon such determination of the trust, became again bound to maintain the road (*b*). And here it may be usefully mentioned, that, by the 26 & 27 Vict. c. 78, a number of turnpike roads were converted into *parish highways* (*c*).

(*z*) 3 Geo. 4, c. 126, s. 110 ; 7 & 8 Geo. 4, c. 24, s. 17 ; *Bussey v. Storey*, 4 B. & Adol. 109.

(*a*) 3 Geo. 4, c. 126, ss. 106, 107, 108 ; *Howitt v. Nottingham Tramways Co.*, 12 Q. B. D. 16.

(*b*) 30 & 31 Vict. c. 121, s. 3.

(*c*) As regards the “*turnpike roads* of the metropolis north of the Thames,” see 7 Geo. 4, c. cxlii ; 10 Geo. 4, c. 59 ; and 26 & 27 Vict. c. 78 ; and as regards the “*streets*”

It will thus be seen that highways were formerly divided into Highways in general and Turnpike Roads,—a twofold division which still (in effect) exists, many of the old turnpike roads having become by later legislation *main roads*.

I. HIGHWAYS IN GENERAL. — Some highways are regulated by the statutes 5 & 6 Will. IV. c. 50, 4 & 5 Vict. cc. 51, 59, and 8 & 9 Vict. c. 71 ; and others are regulated by a different group of statutes, viz., the 25 & 26 Vict. c. 61, 26 & 27 Vict. c. 61, 27 & 28 Vict. c. 101, and 41 & 42 Vict. c. 77 ; and we shall consider first the provisions of the former group of statutes, which apply to all highways not otherwise provided for,—the highways in the southern parts of Wales being within the provisions of the 5 & 6 Will. IV. c. 50, but having also certain special provisions applicable exclusively to themselves (*d*).

The general plan of the 5 & 6 Will. IV. c. 50, and the Acts by which it has been amended, was to place highways under the care of *surveyors* appointed for the respective parishes (subject to the superintending power of the justices of the peace at special sessions holden for the highways) ; and the Act provided, that the expense of maintaining and repairing the highways should be met by a rate, to be made and levied by the surveyor, on the occupiers of land upon the principle of the poor rate (*e*),—and which rate was made leviable by distress (*f*).

of the metropolis, see also 57 Geo. 3, c. cxxix ; 25 & 26 Vict. c. 61, s. 7 ; c. 102, s. 73 ; 30 & 31 Vict. c. 104 ; and 57 & 58 Vict. c. cxxiii. (the London, Streets and Buildings, Consolidation Act, 1894) ; and as regards highways forming the streets in towns generally, see the Towns Improvement Act, 1847 (10 & 11 Vict. c. 34),—which consolidates the provisions usually

inserted in *Paving Acts*, &c., being the local Acts for the construction of such streets.

(*d*) 23 & 24 Vict. c. 68 ; 41 & 42 Vict. c. 34 ; 44 Vict. c. 14. ; and 51 & 52 Vict. c. 41, s. 13.

(*e*) 5 & 6 Will. 4, c. 50, ss. 27, 113 ; *Reg. v. Randall*, 4 Ell. & Bl. 564.

(*f*) 12 & 13 Vict. c. 14.

The surveyor of highways was elected annually, by the inhabitants in vestry assembled ; and he was required to possess certain property qualifications (*g*). When elected, he was compellable—unless he could show some like ground of exemption as applied to an overseer of the poor (*h*),—to take upon himself the office,—being, however, permitted to appoint a deputy, who was subject to the same responsibilities with his principal (*i*). The office was not, in the general case, a paid one ; but the vestry might, if they thought proper, appoint a salaried surveyor (*k*) ; and any two or more parishes might, by mutual agreement, with the consent of the justices in sessions assembled, and for the purposes of the Act, unite themselves into one district, so as to be under the superintendence of a *district surveyor* (*l*) ; but that officer had no authority to make or levy the highway rate, each parish still electing its own separate surveyor for that purpose (*m*). On the other hand, in large parishes, the duties of the office of surveyor might have been committed to more than one person ; for where a parish had a population of more than five thousand, a board of surveyors might have been appointed, called the “Board for the Repair of the Highways,” with power to appoint paid officers,—viz., collectors, an assistant surveyor, a clerk, and a treasurer (*n*). The provisions above stated are for the most part now obsolete, as, under the Public Health Act, 1875, and the Local Government Act, 1894, in all urban districts the town council, or urban district council, are the surveyors and have the management of highways, and in nearly all rural districts the rural district council are the surveyors and have the management.

(*g*) 5 & 6 Will. 4, c. 50, s. 6 ;
R. v. Best, 2 N. S. C. 655 ; *Reg. v.*
Justices of Surrey, 5 D. & L.
 40.

(*h*) *Vide, sup.* p. 69 n.

(*i*) 5 & 6 Will. 4, c. 50, ss. 7, 8.

(*k*) *Ibid.* s. 9.

(*l*) Sects. 13—15.

(*m*) Sects. 16, 17.

(*n*) Sect. 18.

The principal duty of the surveyor is to keep the parish highways in repair (*o*) ; and where any of these are out of repair, complaint may be made (on the oath of one witness) to any justice of the peace, who may grant a summons thereon,—although the charge itself is to be heard before the justices at special sessions for the highways or petty sessions. And if those justices—either on their own view, or on the report of an inspector to be appointed by them for the purpose,—find that a highway is not in thorough and effectual repair, they may convict the surveyor of highways in a penalty not exceeding 5*l.*, and order him to repair within a limited time ; and if such order be not complied with, the surveyor incurs the further forfeiture of such sum as shall be judged adequate to the probable expense of the repairs required ; and the money is to be applied accordingly to that purpose (*p*). And the same course of proceeding is applicable, *mutatis mutandis*, to the case where an occupier is chargeable *ratione tenure* ; but the justices have no power to make such an order, in any case where the *obligation* of repairing comes into question (*q*),—for in such latter case, the remedy is by indictment only, the indictment being preferred, by order of the justices, against the parish or party charged before them, at the next assizes or quarter sessions for the county or place where the highway is situate (*r*) ; but the indictment is, in general, removed, on *certiorari*, into the Queen's Bench Division (*s*).

Any injury whatever done to a highway, by which it is rendered less commodious to the persons using it, is a public nuisance, and (as such) an indictable offence

(*o*) 5 & 6 Will. 4, c. 50, s. 6.

(*p*) Sect. 94.

(*q*) *Ibid.*

(*r*) Sect. 95 ; *The Queen v. Arnold*, 8 Ell. & Bl. 550 ; *The*

Queen v. Haslemere, 3 B. & Smith, 313.

(*s*) *R. v. Sandon*, 3 Ell. & Bl. 390. The county council have power to direct an indictment under 41 & 42 Vict. c. 77, s. 10.

at common law ; and any person may also abate the nuisance (wherever this remedy is applicable), by removing the thing by which it is caused (*t*) ; but locomotives on roads, although in themselves a nuisance, are now legalised by statute, subject to the provisions and within the limits prescribed by the statutes (*u*). Also, the surveyor is, by statute, specially required to remove all obstructions and encroachments on the highways (*x*) ; and to impound cattle found straying thereon (*y*),—the statutes inflicting also penalties on all persons who commit an injury to the highway, or who obstruct the free use thereof (*z*).

By the common law, the course of an antient highway could not be changed, without licence from the crown,—to be obtained after suing out a writ of *ad quod damnum*, and after the finding of an inquisition thereon that the alteration would not be prejudicial to the public (*a*) ; but, by the 5 & 6 Will. IV. c. 50, any two justices of the division might (subject to certain conditions and restrictions) order any highway to be widened or enlarged (*b*). Also, the inhabitants in vestry assembled might direct the surveyor to, or the town council or district council (where they are the highway authority) might, apply to two justices of the division, to examine a highway, with a view to its being diverted or stopped up,—and if these justices

(*t*) 1 Hawk. P. C. ch. 76, ss. 48, 61.

(*u*) 24 & 25 Vict. c. 70 ; 28 & 29 Vict. c. 83 ; 41 & 42 Vict. c. 77 (Part II.) ; 42 & 43 Vict. c. 67 ; 59 & 60 Vict. c. 36 ; and 61 & 62 Vict. c. 29 ; *Powell v. Fall*, 5 Q. B. D. 597 ; *Kent County Council v. Vidler*, [1895] 1 Q. B. 448 ; *Kent County Council v. Gerard*, [1897] A. C. 633.

(*x*) 27 & 28 Vict. c. 101, s. 51 ; *Harris v. Mobbs*, 3 Exch. D. 268.

(*y*) 5 & 6 Will. 4, c. 50, ss. 64—69 ; 27 & 28 Vict. c. 101, s. 25 ; *Keane v. Reynolds*, 2 Ell. & Bl. 748.

(*z*) 5 & 6 Will. 4, c. 50, s. 72 ; 27 & 28 Vict. c. 101, s. 25 ; *Walker v. Horner*, 1 Q. B. D. 4 ; *Taylor v. Goodwin*, 4 Q. B. D. 228.

(*a*) 1 Hawk. P. C. ch. 76, s. 35 ; *Fowler v. Sanders*, Cr. Jac. 446.

(*b*) 5 & 6 Will. 4, c. 50, s. 82.

certified in favour of such a proceeding, their certificate to that effect was sent to the quarter sessions, who made the order accordingly (*c*), the owner of the lands through which the new highway was to pass consenting thereto (*d*); but any person aggrieved by the proceeding might appeal from the certificate of the justices to the quarter sessions, before the order of that court was made (*e*); and in the case of such an appeal, the propriety of the stoppage or diversion was to be determined according to the verdict of a jury impannelled to try the question (*f*).

The Highway Act, 1835, not having been found to work in all respects in a satisfactory manner, the other Highway Acts above referred to, (viz., the 25 & 26 Vict. c. 61, 26 & 27 Vict. c. 61, 27 & 28 Vict. c. 101, and 41 & 42 Vict. c. 77,) were passed; and these, without disturbing generally the operation of the Highway Act of 1835, established a fresh plan which any particular county was at liberty to adopt. For, under these more recent statutes, the justices of any county, in sessions assembled, were empowered to form such county (or any part of it) into a *highway district* to be governed by a *highway board* (*g*); in which board all the property, liabilities, and (in general) all the powers were to vest which previously belonged to the surveyor of highways for the district (*h*); and more than one such district might be formed in the county, or in any part of it; and so far as possible, the districts were to be coincident in area with the rural sanitary districts of the county (*i*),—

(*c*) 5 & 6 Will. 4, c. 50, ss. 84, 91; *The Queen v. Harvey*, Law Rep., 10 Q. B. 46.

(*d*) Sect. 85; *The Queen v. Justices of Worcestershire*, 3 Ell. & Bl. 447; *The Queen v. Sir R. Wallace*, 4 Q. B. D. 641.

(*e*) Sect. 88; *The Queen v. Justices of Lancashire*, 8 Ell. & Bl. 563.

(*f*) Sect. 89.

(*g*) 25 & 26 Vict. c. 61, ss. 5—9.

(*h*) *Ibid.* s. 11.

(*i*) 41 & 42 Vict. c. 77, s. 3.

all which provisions are, in substance, still in force. The rural sanitary authority might, upon application to, and with the sanction of, the county authority, exercise within its district, the office of surveyor of highways,—and become, in fact, the highway board (*k*); but otherwise the highway board (where it still exists) consists of *way-wardens*, elected annually from the several parishes within the district (*l*),—together with the *justices* acting for the county, and residing within the district (*m*); and the duties, powers, and liabilities of such highway board (who may appoint a treasurer, clerk, district surveyor, and paid collectors) may be stated, generally, to be the same as those thrown by the 5 & 6 Will. IV. c. 50, upon the surveyors of highways (*n*); and the proceeding to compel a highway board to perform its duties, is analogous to that already mentioned with reference to such surveyors (*o*). And with regard to the expenses incurred by the highway board, these (save in rare cases) are authorized to be charged upon a *district fund*, to which the several parishes forming the district are to contribute. As regards *disturnpiked* roads, half of the expense of repairing these was to be defrayed out of the county rate (*p*); but many of these are now *main* roads, and the whole expense of maintaining and repairing them is borne by the county council (*q*). As regards the “extraordinary expenses” incurred in respect of the damage done to the highway or road through the “extraordinary traffic” thereon, by (*e.g.*) traction engines, the party in consequence of whose

(*k*) 41 & 42 Vict. c. 77, ss. 4, 5.

(*l*) 25 & 26 Vict. c. 61, ss. 9, 10;
45 & 46 Vict. c. 27; *The Queen v. Cooper*, Law Rep., 5 Q. B. 457.

(*m*) 25 & 26 Vict. c. 61, s. 9;
27 & 28 Vict. c. 101, ss. 20, 31, 45.

(*n*) 25 & 26 Vict. c. 61, s. 17;

and 27 & 28 Vict. c. 101, first schedule.

(*o*) 25 & 26 Vict. c. 61, ss. 18, 19; 41 & 42 Vict. c. 77, s. 10.

(*p*) 41 & 42 Vict. c. 77, s. 13;
45 & 46 Vict. c. 27.

(*q*) 51 & 52 Vict. c. 41, s. 11.

order the damage was done is (in effect) liable to recoup the road authority all these expenses (*r*).

II. TURNPIKE ROADS.—These roads no longer exist, but they have played such an important part in the history of highway law that a short statement about them may not be out of place here before dealing with main roads. They did not in general fall within the operation of the statutes relative to highways ; but were regulated, primarily, by their own local Acts (continued from time to time by the Expiring Laws Continuance Acts), and (subject thereto) by statutes of a general character,—that is to say, by the statutes applicable to turnpike roads generally (*s*), the Turnpike Act, 1823 (3 Geo. IV. c. 126) being the principal of these general Acts (*t*) ; and the provisions of the general Turnpike Acts may, as to their general effect, be stated as follows :—

Every trustee or commissioner of a turnpike road had to possess a certain qualification in point of property (*u*), and to make a declaration that he would duly execute his duties (*x*) ; and he was prohibited in general from holding any profitable office or contract in respect of the road of which he was trustee (*y*). The justices of the peace, of the different counties or divisions through which the road passes, were *ex officio* commissioners of the trust (*z*). The trustees or

(*r*) 41 & 42 Vict. c. 77, s. 23 ; 61 & 62 Vict. c. 29, s. 12 ; *Kent County Council v. Gerard*, [1897] A. C. 633.

(*s*) 4 Geo. 4, c. 95, s. 90 ; 3 Chitty's Burn, 177.

(*t*) 3 Geo. 4, c. 126 ; 4 Geo. 4, cc. 16, 95 ; 5 Geo. 4, c. 69 ; 7 & 8 Geo. 4, c. 24 ; 9 Geo. 4, c. 77 ; 1 & 2 Will. 4, c. 25 ; 2 & 3 Will. 4, c. 124 ; 3 & 4 Will. 4, c. 80 ; 4 & 5 Will. 4, c. 81 ; 5 & 6 Will. 4, c. 18 ; 2 & 3 Vict. c. 46 ; 3 & 4 Vict. cc. 39, 51 ; 4 & 5 Vict.

cc. 33, 51 ; 12 & 13 Vict. c. 46 ; 14 & 15 Vict. c. 38 ; and (as to the turnpike roads in *South Wales*) 7 & 8 Vict. c. 91 ; 8 & 9 Vict. c. 61 ; 10 & 11 Vict. c. 72 ; 38 & 39 Vict. c. 35 ; and 51 & 52 Vict. c. 41, s. 13.

(*u*) 3 Geo. 4, c. 126, s. 62.

(*x*) 4 Geo. 4, c. 95, s. 32 ; 31 & 32 Vict. c. 72, s. 12.

(*y*) 3 Geo. 4, c. 126, s. 65 ; 30 & 31 Vict. c. 121, s. 2.

(*z*) 3 Geo. 4, c. 126, s. 61.

commissioners were not only to maintain and keep in repair the roads committed to their management ; but were to construct and maintain causeways at the sides of them for the use of foot passengers (*a*) ; to place milestones (*b*) ; and to widen, divert, or improve the roads as they should think proper,—for which purposes, they were empowered to purchase lands ; and, subject to certain conditions, to turn the roads over the property of individuals (*c*) ; and to take materials, for the repair of the roads, from the lands of private owners (*d*) ; and they were also empowered, (if they thought proper,) to contract, by the year or otherwise, with any person for repairing or amending the roads, or any bridges or buildings thereon (*e*). The trustees or commissioners were also bound to prevent or to remove all nuisances and annoyances on the roads under their management (*f*) ; and they might direct prosecutions by indictment, or otherwise, for all such nuisances or annoyances (*g*).

To meet the expenses incurred, the trustees or commissioners were authorized to erect toll-gates (*h*) ; and to take tolls thereat, every day from twelve at night to twelve the night following (*i*), putting up at every toll-gate a table of tolls, and providing toll tickets to acknowledge the receipt (*k*) ; and no person, unless specially exempted, might pass, with any beast or carriage, without paying (*l*) : and if a passenger refused to pay, the toll-collector might seize and distrain his beast or carriage, or any other of his goods ; and, in default of payment for four days, might sell such distress (*m*) ; and any dispute about the amount of

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| (<i>a</i>) 3 Geo. 4, c. 126, ss. 111, 112, 113. | (<i>g</i>) 3 Geo. 4, c. 126, s. 133. |
| (<i>b</i>) Sect. 119. | (<i>h</i>) 9 Geo. 4, c. 77, s. 5. |
| (<i>c</i>) 9 Geo. 4, c. 77, s. 9 ; 4 Geo. 4, | (<i>i</i>) Sect. 6. |
| c. 95, s. 65 ; 3 Geo. 4, c. 126, s. 84. | (<i>k</i>) 3 Geo. 4, c. 126, s. 37 ; 4 |
| (<i>d</i>) 3 Geo. 4, c. 126, s. 97. | Geo. 4, c. 95, s. 28. |
| (<i>e</i>) 4 Geo. 4, c. 95, s. 78. | (<i>l</i>) <i>Williams v. Ellis</i> , 5 Q. B. D. |
| (<i>f</i>) 5 & 6 Will. 4, c. 50, s. 70 ; | 175. |
| 27 & 28 Vict. c. 75, s. 1. | (<i>m</i>) 3 & 4 Geo. 4, c. 126, s. 39. |

the toll due, or the charges of a distress, was to be settled by any justice of the peace acting for the place where the toll-gate was situate (*n*),—any misconduct on the part of the toll-collector being also made matter of indictment (*o*). But no toll was to be taken on horses or carriages in attendance on her Majesty (*p*), or on any of the royal family, or returning from such duty (*q*); nor from officers or soldiers in uniform (*r*); nor from volunteers on duty and in uniform (*s*); nor from the police (*t*); nor on carriages carrying, or returning from carrying, commissariat stores (*u*), or materials for turnpike roads or highways; nor (in general) on carts employed in the conveyance of manure, or of implements of industry (*x*), or of produce grown on the land of the owner, and not sold or going to be sold (*y*), or conveying lime for the improvement of the land (*z*); and in general any person, on his way to or from his proper parochial church or chapel,—or to or from his usual place of religious worship tolerated by law,—either on Sundays, or on any other days on which divine service is by authority ordered to be celebrated (*a*), was exempt from paying toll. Parishioners were also exempted in attending or returning from the funeral of persons who died and were buried in the parish in which the turnpike road lies; as also were rectors, vicars,

(*n*) 3 & 4 Geo. 4, c. 126, s. 40.

(*o*) Sect. 52; 4 Geo. 4, c. 95, ss. 30, 50; *R. v. Hants (Justices)*, 1 B. & Adol. 84, 654.

(*p*) *Westover v. Perkins*, 2 E. & E. 57.

(*q*) 3 Geo. 4, c. 126, s. 32; 4 Geo. 4, c. 95, s. 24.

(*r*) 42 & 43 Vict. c. 33, s. 137.

(*s*) 26 & 27 Vict. c. 65, s. 45; *Tunstall v. Lloyd*, 1 B. & S. 95.

(*t*) 2 & 3 Vict. c. 47, s. 10; 3 & 4 Vict. c. 88, s. 1; 14 & 15 Vict. c. 38, s. 4.

(*u*) 3 Geo. 4, c. 126, s. 32; *Toomer v. Reeves*, Law Rep., 3 C. P. 62.

(*x*) 14 & 15 Vict. c. 38, s. 4; *Skinner v. Visger*, Law Rep., 9 Q. B. 199.

(*y*) 3 Geo. 4, c. 126, s. 32; 5 & 6 Will. 4, c. 18; 3 & 4 Vict. c. 51; 14 & 15 Vict. c. 38, s. 4; *Foster v. Tucker*, Law Rep., 5 Q. B. 224.

(*z*) 13 & 14 Vict. c. 79, s. 3.

(*a*) 3 Geo. 4, c. 126, ss. 32, 33; *Lewis v. Hammond*, 2 B. & A. 206.

or curates going to, or returning from, their parochial duties (*b*) ; also, voters going to, or returning from, the election of a member for the county in which the road was situated ; and all horses or other cattle, as well as vehicles of every description, were exempted which only crossed a turnpike road, or did not pass along it above a hundred yards (*c*). The trustees were empowered, on obtaining the previous consent in writing of the secretary of state, to borrow money, as they might think proper, on the credit of the tolls, and might mortgage them, by way of security, to the lenders (*d*) ; and they might, subject to the regulations in this behalf prescribed by the Acts, let the tolls to farm for three years at a time (*e*) ; and might compound for tolls with any person or persons for a year at a time ; or reduce or increase (within the provisions of their Acts) the amount of the tolls (*f*) ; or, generally, make such other arrangements as circumstances required (*g*).

But as regards turnpike roads, all such roads (as we have already stated) have now ceased ; and by virtue of the provisions in that behalf contained in the 41 & 42 Vict. c. 77 (commonly called the Highways and Locomotives (Amendment) Act, 1878), all such roads have now

(*b*) *Layard v. Overy*, Law Rep., 3 Q. B. 415.

(*c*) 3 Geo. 4, c. 126, s. 32 ; 4 & 5 Vict. c. 33 ; *Veitch v. The Trustees of Exeter Roads*, 8 Ell. & Bl. 986 ; *Stanley v. Mortlock*, Law Rep., 5 C. P. 497 ; *Harding v. Headington*, *ib.* 9 Q. B. 157.

(*d*) 3 Geo. 4, c. 126, s. 81. See 12 & 13 Vict. c. 87 ; 13 & 14 Vict. c. 79 ; 14 & 15 Vict. c. 38 ; 15 & 16 Vict. c. 33 ; 17 & 18 Vict. cc. 51, 58 ; 18 & 19 Vict. c. 102 ; 19 & 20 Vict. c. 12 ; 20 & 21 Vict. c. 9 ; 21 & 22 Vict. c. 80 ; 22 & 23 Vict. c. 33 ; 23 & 24 Vict.

cc. 70, 73 ; 24 & 25 Vict. c. 46, s. 2 ; 26 & 27 Vict. c. 98 ; 27 & 28 Vict. c. 79 ; 28 & 29 Vict. c. 91 ; 29 & 30 Vict. c. 92 ; 30 & 31 Vict. c. 66 ; 31 & 32 Vict. c. 66 ; 33 & 34 Vict. c. 22 ; *The Queen v. French*, 2 Q. B. D. 187 ; 4 Q. B. D. 507.

(*e*) 3 Geo. 4, c. 126, s. 55 ; *Stott v. Clegg*, 13 C. B. (N.S.) 619.

(*f*) 3 Geo. 4, c. 126, s. 43 ; 4 Geo. 4, c. 95, s. 13 ; *R. v. Trustees of Bury and Stratton Roads*, 4 B. & C. 361.

(*g*) 35 & 36 Vict. c. 72.

become or are to be deemed *main roads* (sect. 13). Also, as regards any highway within its district, the highway authority may (with the sanction of the county authority) declare such road to be a “main road” (sect. 15); and by the like authority, a main road may be reduced again to the character of an ordinary highway (sect. 16).

Under the provisions of the Local Government Act, 1888 (*h*), the administrative business of the justices of the county in quarter sessions assembled relative to bridges (and roads repairable with bridges), and the powers as to highways (and locomotives thereon), which were theretofore vested in the county authority, are transferred to the county council established by the Local Government Act, 1888 (sect. 3); and such council is also thereby authorized to purchase or otherwise acquire any existing bridges which are not county bridges, and to erect new bridges, thereafter maintaining same (sect. 6). And as regards *main roads* within the 41 & 42 Vict. c. 77 above mentioned, the maintenance, repair, and improvement thereof (together with the bridges carrying the same, when repairable by the highway authority) are thrown upon the county council,—which is to have for these purposes all the powers, and to be under all the duties, of a highway board (sect. 11). But any urban sanitary authority may claim to retain such roads within its own district; in which latter case, the urban authority is to receive, from the county council, an annual payment towards the expense of their maintenance and repair, and of their reasonable improvement (sect. 11); and the county council may also contract with any district council (as defined by the Act) (*i*) for the maintenance, repair, and improvement of main roads (sect. 11); and before the county council declares any road to be a main road, they are first to see that the road is in a proper state of repair.

(*h*) 51 & 52 Vict. c. 41.

(*i*) *Ibid.* s. 100.

As regards the “main roads” situate within any “*county* borough,” these are transferred (with the cost of their maintenance, repair, and improvement) to the council of such borough; but as regards the main roads within other boroughs, these are to be dealt with as main roads of the administrative county within the area of which such boroughs are comprised (sect. 35),—although the urban sanitary authority of such latter borough may retain (and is given the right to retain) its own main roads, equally as in the case of county boroughs (sect. 38); and nothing in the Local Government Act, 1888, affects any liability to repair *ratione tenuræ* (sect. 97).

Under the Local Government Act, 1894 (*k*), the district councils established by that Act for rural sanitary districts are become also the highway authorities for such districts, and have in that particular superseded any highway board or highway surveyor within their district, save in a few excepted cases; and they have succeeded to all the duties and have acquired all the rights of such boards or surveyors, and of the highway powers, &c., of vestries, together with power to enforce the repairs of all highways that are repairable *ratione tenuræ* (sect. 25).

(*k*) 56 & 57 Vict. c. 73.

CHAPTER VIII.

OF THE LAWS RELATING TO NAVIGATION,—AND TO THE
MERCANTILE MARINE.

IN attempting to make a concise statement of the laws relating to Navigation and Merchant Shipping, we shall distribute our statement under the following heads:—

(I.) The Laws relating to Navigation ; (II.) The Laws relating to the Ownership, Registration, and Transfer of Merchant Ships ; (III.) The Laws relating to Merchant Seamen ; (IV.) The Laws relating to Pilotage ; (V.) The Laws relating to Lighthouses, Beacons, and Seamarks ; (VI.) The Laws relating to the Liability of Shipowners for loss or damage ; and (VII.) The Laws relating to Fishing Boats and to Sea-Fisheries.

I. THE LAWS RELATING TO NAVIGATION.—Until the year 1825, this subject was in the main regulated by [the Navigation Act of 12 Charles II. c. 18,—an Act the provisions of which in a more rudimentary form had been first framed in 1650 (*a*), *i.e.*, in the time of the Long Parliament ; and these provisions (it is said) were framed, with the object of dealing a blow to our own sugar islands, which were disaffected to the Parliament and still held out for Charles II., by stopping or crippling their trade with the Dutch (*b*) ; and with the object also of clipping the wings of those our opulent and enterprising neighbours (*c*),—with which objects in view, this law prohibited all ships of

(*a*) Scobell, 132.

(*c*) 1 Bl. Com. 418.

(*b*) Mod. Univ. Hist. xii. 289.

[foreign nations from trading with any English plantation without a licence from the council of state. In 1651, the prohibition was extended also to ships trading with the mother country,—consequently, no goods were suffered to be imported into England, or into any English dependency, in any other than English bottoms, or in the ships of that European nation, of which the merchandize imported was the genuine growth or manufacture. At the Restoration, these baleful provisions were continued, by the Navigation Act just mentioned, with, however, this beneficial provision added thereto, namely, that the master and three-fourths of the seamen should be English, the object being to encourage, by the exclusion of foreign competitors, the ships, seamen, and commerce of Great Britain.]

In the reign of King George the Fourth, both the Navigation Act and all other navigation Acts then in force were repealed, and a new system of regulations was established (*d*); and the new system was afterwards amended by various statutes passed in the reign of King William the Fourth (*e*), and in the earlier part of the reign of her present Majesty (*f*); but the new system, or any of the amendments thereof, did not involve any material departure from the policy of encouraging our own mercantile marine and commerce, by prohibitions of the like nature in general to those above described. More recently, however, under the influence of the doctrines commonly designated as those of “free trade” (*g*), a new

(*d*) 6 Geo. 4, c. 105.

(*e*) 3 & 4 Will. 4, cc. 54, 55, 59.

(*f*) 8 & 9 Vict. cc. 88, 89, 93.

(*g*) In his *Wealth of Nations*, vol. ii. p. 194, Adam Smith (who may be called the father of “free trade”) considered, that the Act of Navigation “was not favourable to the growth of that opulence which should arise from foreign

“commerce; for that a nation
“will be most likely to buy cheap,
“when by the most perfect freedom of trade it encourages all
“nations to bring to it the goods
“which it has occasion to purchase; and a nation will be
“most likely to sell dear, when
“its markets are thus filled with
“the greatest number of buyers.”

course of legislation (commencing with the 12 & 13 Vict. c. 29) was entered upon, and has been since consistently pursued; until at length the old system of prohibition (which latterly had come to be confined only to the coasting trade of the United Kingdom and of the Channel Islands) (*h*) has been relinquished altogether; except only as regards the trade from one part of any British possession in Asia, Africa, and America, to another part of the same possession—as to which latter trade, the law still is, that it shall not be carried on except in British ships (*i*); though, upon an address from the legislature of any such possession, praying that the conveyance of goods or passengers may take place, as far as they are concerned, free from such restrictions, her Majesty is empowered to authorize the same by order in council, on such terms as she may think fit (*k*). In all other respects, foreign vessels are now generally allowed a free commercial intercourse with this country and its dependencies, upon terms of perfect equality with our own vessels—a concession qualified, however, in the first instance, by some very important provisions, tending to confine such intercourse to such nations as consented, on their part, to concede to us a reciprocal and equal freedom. For, by the 16 & 17 Vict. c. 107, ss. 324—326, it was enacted, that if British vessels were subjected, in any foreign country, to any *prohibitions* or *restrictions*, as to the voyages in which they might engage or the articles which they might import or export, her Majesty might, by order in council, impose corresponding prohibitions and restrictions upon the ships of such foreign country; and further, that if British ships were directly or indirectly subjected, in any foreign country, to *duties* or *charges* from which the national vessels of such country were exempt; or if any duties were imposed

(*h*) 12 & 13 Vict. c. 29; 17 & 18 Vict. c. 5; 18 & 19 Vict. c. 96, ss. 13, 14, 15.

(*i*) 16 & 17 Vict. c. 107, s. 163.
(*k*) Sect. 328.

there upon articles imported or exported in British ships, which were not equally imposed upon the like articles in national vessels ; or if *any preference whatsoever was shown*, either directly or indirectly, to vessels of such country over British vessels, or to articles imported or exported in the former, over the like articles imported or exported in the latter ; or if British trade and navigation were not placed by such foreign country on *as advantageous a footing as the trade and navigation of the most favoured nation*,—then, and in any of these cases, her Majesty might, by order in council, impose such duties of tonnage upon the ships of such foreign nations, or such duties on goods imported or exported in its ships, as would countervail the disadvantages to which British trade or navigation was subjected. And these provisions still remain substantially in force, notwithstanding that the Act 16 & 17 Vict. c. 107 has been now in great part repealed (*l*).

The next five of the subjects enumerated at the outset of this chapter are in the main regulated by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which now supersedes and consolidates the provisions contained in a series of Acts called “The Merchant Shipping Acts, 1854 to 1892,” being (among other Acts of less importance) the various Acts following, viz., 17 & 18 Vict. c. 104 (*m*) ; 18 & 19 Vict. c. 91 ; 25 & 26 Vict. c. 63 ; 30 & 31 Vict. c. 124 ; 34 & 35 Vict. c. 110 ; 35 & 36 Vict. c. 73 ; 36 & 37 Vict. c. 85 ; 39 & 40 Vict. c. 80 ; 43 & 44 Vict. cc. 22, 43 ; 45 &

(*l*) 38 & 39 Vict. c. 66 ; 39 & 40 Vict. c. 36, s. 288. See also 3 & 4 Will. 4, c. 93 ; 3 & 4 Vict. c. 56 ; 6 & 7 Vict. c. 80 ; and 57 & 58 Vict. c. 60 (containing restrictive and regulative provisions regarding the trade with any British possessions on or near the Continent of Europe ; or in Africa ; or within the Mediterranean Sea ; and regarding the trade with India

and China ; and the coasting trade of India).

(*m*) The Merchant Shipping Act, 1854, referred to in the text, was in the nature of a complete code of shipping law ; and by the Merchant Shipping (Repeal) Act, 1854 (17 & 18 Vict. c. 120), numerous prior enactments on the subject were repealed.

46 Vict. c. 76 ; 47 & 48 Vict. c. 43 ; 50 & 51 Vict. c. 62 ; 51 & 52 Vict. c. 24 ; 52 & 53 Vict. cc. 43, 46, 68, and 73 ; 53 & 54 Vict. c. 9 ; and 55 & 56 Vict. c. 37 ; and with regard to all these matters, they are (by sect. 713) placed under the general superintendence of that committee of the privy council which is commonly described as the Board of Trade. It will be necessary, however, to treat of these five subjects separately, each in its due order, but only in such general and concise manner as the nature of this treatise permits. And here we may conveniently premise, firstly, that (besides the provisions hereinafter referred to) the Merchant Shipping Act, 1894, contains divers analogous provisions applicable to the colonies and to other the Queen's dominions abroad (*m*) ; and, secondly, that the Act contains also specific provisions relative to *fishing boats*,—for the due register thereof on the “ Fishing Boats Register ” (sects. 373—375), and for the maintenance of discipline on board, and otherwise for the due management and regulation, of these boats (sects. 376—398), including *trawlers* (sects. 399—417) ; but these latter provisions, which are of a very multitudinous character, cannot be dealt with in this chapter ; and thirdly, that the Act of 1894 has been (in some few respects) amended by the Acts of 1897 and 1898, which are specified in the foot-note (*n*).

II. THE LAWS RELATING TO THE OWNERSHIP, REGISTRATION, AND TRANSFER OF MERCHANT SHIPS.—The Merchant Shipping Act, 1894, provides, that no ship shall be deemed a British ship unless she belong wholly to owners of some or one of the following descriptions, namely,—natural-born subjects ; persons made denizens, or naturalized

(*m*) 57 & 58 Vict. c. 60, ss. 91, 712, superseding 17 & 18 Vict. c. 104, s. 17.

(*n*) 60 & 61 Vict. c. 59 (as to under-manning) ; and c. 61 (as to

pilotage) ; and 61 & 62 Vict. c. 14 (as to the liability of ship-owners) ; and c. 44 (as to the Mercantile Marine Fund and the Naval Reserve).

by Act of Parliament, or by the proper legislative authority of some British possession ; or bodies corporate established under the laws of (and having their principal place of business in) the United Kingdom or some British possession (*o*). But as to natural-born subjects, it is provided, that none can be an owner who has taken the oath of allegiance to any foreign sovereign or state,—unless he has subsequently resumed his allegiance to the Queen, and is and continues during the whole of his ownership resident within her Majesty's dominions, or if not so resident, then is a partner in a firm actually carrying on business within her Majesty's dominions ; and persons made denizens or naturalized,—when they too have taken such oath of foreign allegiance, are subject to the like provisions ; moreover, nothing in the Naturalization Act, 1870, is “to qualify an ‘alien’ to be the owner of a British ship” (*p*). And the Merchant Shipping Act, 1894, further provides, that every British ship (with some few exceptions) must be *registered* (*q*) ; and unless registered, she is not to be recognized as a British ship, or to be entitled to any of the advantages, or to the protection, usually enjoyed by such a ship, or to use the national flag or to assume the national character (*r*) ; and a vessel which is required by the Act to be registered may be detained until the master of the ship, if so required, produces the certificate of the due registration of the vessel. The registration is effected, in the United Kingdom, at any port approved by the proper

(*o*) 57 & 58 Vict. c. 60, s. 1.

(*p*) 33 & 34 Vict. c. 14, s. 14.

(*q*) 57 & 58 Vict. c. 60, s. 2.

The exceptions are—1. Ships not exceeding fifteen tons burthen, employed solely on the rivers or coasts of the United Kingdom, or of some British possession within which the managing owners reside ; 2. Ships not exceeding thirty

tons burthen, and not having a whole or fixed deck, employed solely coastwise, on the shores of Newfoundland, or parts adjacent, or in the Gulf of St. Lawrence, or on such portion of the coasts of Canada as lie bordering on such gulf.

(*r*) *The Andalusian*, 3 P. D. 182.

authority for the registry of ships ; and is made with the collector, comptroller, or other principal officer of the customs in such port (*s*) ; and the port at which any ship is registered is thereafter considered as that to which she belongs, till her registry is transferred to another port (*t*). The registration comprises, *inter alia*, the name of the ship, —which must have been previously marked on each of her bows, and (together with her port of registry) on her stern, in a permanent and conspicuous manner to the satisfaction of the Board of Trade (*u*) ; and also the names and descriptions of the owners (*x*). And with regard to the owners that may be registered, the Act provides as follows :—(1) The property in every ship is always to be divided for this purpose into sixty-four shares (*y*) ; (2) No person is to be registered as owner of any fractional part of a share (*z*) ; (3) The individuals registered as owners of the sixty-four shares are not to exceed sixty-four (formerly thirty-two) in number, except that any number of persons, not exceeding five, may be registered as the joint owners of any particular share (*a*) ; (4) The property in the ship or its shares, so far as regards the power of making title to a purchaser or mortgagee, is vested exclusively in the registered owners (*b*) ; but any number of other persons may be *beneficially or equitably* interested therein, and may enforce their rights as such in the Court of Chancery (*c*) ; (5) A registered ship, or any share therein, when disposed of to a person qualified to be the owner of a British ship (*d*), is *transferred* by a bill of sale, or deed in the prescribed form, the name of the transferee being entered on the register (*e*), and no other registration

(s) 57 & 58 Vict. c. 60, s. 4.

(t) Sect. 13.

(u) Sect. 7.

(x) Sect. 11.

(y) Sect. 5.

(z) *Ibid.*(a) *Ibid.*

(b) Sects. 5, 24, 56.

(c) Sects. 5, 57 ; *Liverpool Marine Credit Co. v. Wilson*, Law Rep., 7 Ch. App. 507 ; *Rusden v. Pope*, *ib.* 3 Exch. 269.

(d) Sect. 24.

(e) Sects. 24—26.

thereof being required ; and (6) A registered ship or any share therein may be *mortgaged* by instrument in the prescribed form (*f*), the mortgage being entered on the register (*g*) ; and where there are several mortgagees, their respective priorities are in all cases determined according to the times of their respective registrations and not the times of their respective executions (*h*) ; and when a mortgage is discharged, the entry thereof on the register is to be vacated (*i*). The Act contains also minute provisions, relative to the preliminaries to registration and the mode of compliance therewith ; and relative to the transmission of the title to the ship, otherwise than by transfer, as, *e.g.*, on death, marriage, and the like ; and provides also (among other things) for the granting of *certificates of mortgage and sale* to the registered owners of the ship, enabling them to mortgage the ship or their share therein, or to sell the whole ship, abroad out of the country of its registry.

III. THE LAWS RELATING TO MERCHANT SEAMEN.—These laws have chiefly in view the great national object of promoting the increase of our mercantile marine, of securing their health efficiency and discipline, and of affording them all due encouragement and protection. And in furtherance of these objects, the Act of 1894, continuing in these respects the like provisions contained in the earlier Merchant Shipping Acts, provides, that local marine boards shall be established at certain of the sea ports of the United Kingdom, for carrying into effect the particular provisions of the Act, under the general superintendence of the Board of Trade (*k*). And in every such seaport, its local marine board is required to establish a mercantile

(*f*) 57 & 58 Vict. c. 60, s. 31 ;
Ward v. Beck, 15 C. B. (N.S.)
 668 ; *The Innisfallen*, Law Rep.,
 1 Adm. & Ecc 72.

(*g*) 57 & 58 Vict. c. 60, s. 31.
 (*h*) Sect. 33.
 (*i*) Sect. 32.
 (*k*) Sect. 244.

marine office or offices, under the management of *Superintendents* (*l*) ; whose business it is, to afford facilities for engaging seamen by means of registries of their names and characters ; to superintend and facilitate their engagement and discharge ; to provide means for securing the presence on board, at the proper times, of men so engaged ; to encourage the making of apprenticeships to the sea service ; and generally, to perform such other duties, relating to merchant seamen and merchant ships, as may be committed to them by the Board of Trade (*m*). Examinations also are instituted for persons intending to become masters or mates of foreign-going ships, or of home-trade passenger ships, before examiners appointed by the local marine board (*n*) ; and no person is to be employed in a foreign-going ship as master, or as first or second or only mate—or in a home-trade passenger ship, as master or first or only mate—unless he possesses a “certificate of competency” to be obtained after such examination (*o*) ; or (in the case of a person who has attained a certain rank in the service of her Majesty) a “certificate of service” (*p*),—either of which certificates (according to the nature of the case) is to be granted by the Board of Trade, to such persons as it finds to be entitled to them. And the Act provides also for certificates of competency as engineers being granted, to persons desirous of obtaining the same (*q*).

In addition to these provisions, there are a variety of others, intended for the protection of seamen, and for promoting their health and comfort, among which we may note the following, namely :—that the master of every ship—except those of less than eighty tons registered tonnage exclusively employed in the coasting trade of the United Kingdom—shall, in the case of every seaman

(*l*) 57 & 58 Vict. c. 60, ss. 246,
247.

(*m*) Sect. 247.

(*n*) Sect. 94.

(*o*) Sect. 92.

(*p*) Sect. 99.

(*q*) Sect. 96.

whom he carries to sea from any part of the United Kingdom, enter into an agreement with him (*r*), in a form sanctioned by the Board of Trade, and signed by both master and seaman (the master to sign before the seaman signs), setting forth the nature and duration of the voyage, or else the maximum period of the voyage or engagement, and the places or parts of the world (if any) to which it is not to extend, the number and description of the crew, the time at which each seaman is to be on board or to begin work, the capacity in which he is to serve, the amount of his wages, a scale of provisions, together with the approved and agreed regulations as to conduct and as to fines or other punishments for misconduct (*s*). The Act also provides, that no right to wages shall be dependent on the earning of freight (*t*),—an innovation upon the common law, which regarded freight as the mother of wages; and that every stipulation on the part of the seaman, for abandoning his right to wages, in the event of the loss of the ship, or any right which he may have or obtain in the nature of salvage, shall be wholly inoperative (*u*). The Act also provides, that seamen and apprentices in any ship shall have such space allotted to them as in the Act is specified (*x*); and which space is to be kept free from stores or goods of any kind (not being the personal property of the crew in use during the voyage), and is to be properly constructed and ventilated (*y*); also, that every ship, navigating between the United Kingdom and any place out of the same, shall (besides having a due supply of wholesome provisions and water) (*z*) be properly supplied with medicines, to be examined by medical inspectors appointed for that purpose (*a*), and who may

(*r*) 57 & 58 Vict. c. 60, s. 113.

(*s*) Sect. 114.

(*t*) Sect. 157.

(*u*) Sect. 156; *The Rosario*, 2

P. D. 41; 25 & 26 Vict. c. 63, s. 18.

(*x*) 57 & 58 Vict. c. 60, s. 210.

(*y*) *Ibid.*

(*z*) Sects. 198, 199.

(*a*) Sects. 200—209.

also inspect the state of health of the seamen (*b*). The Act also provides, that “official log-books” shall be kept in every ship (except those employed exclusively in the coasting trade of the United Kingdom), in such form as is prescribed by the Board of Trade, either in connection with or distinct from the ordinary log-books; and that, in all cases, entry shall be made in the official log-books (as soon as possible after the occurrence), of every offence committed and punishment inflicted, and of every case of illness, injury, or death (*c*).

Careful provisions have also been made to protect seamen as well as others from the dangers which arise from ships being sent to sea in an unseaworthy and unsafe condition. Thus, in the first place, it is enacted by sect. 463 of the Act of 1894, continuing the like provision contained in the 34 & 35 Vict. c. 110, s. 7, that when any seaman or apprentice is being proceeded against for deserting his ship, or for neglecting or refusing to join, or for being absent or quitting her without leave, and it shall be alleged by a certain proportion of the seamen belonging to such ship, that (by reason of unseaworthiness, overloading, improper loading, defective equipment, or for any other reason) she is not in a fit condition to proceed to sea, or that the accommodation therein is insufficient,—the court having cognizance of the case may inquire into such allegations, and in case of doubt may order a survey of the vessel, and the costs of such survey are directed to follow the event thereof. And in the second place, by sects. 459, 460 of the Act of 1894, continuing (in effect) the like provisions contained in the

(*b*) 57 & 58 Vict. c. 60, s. 203.

(*c*) Sects. 239—243; see also 46 & 47 Vict. c. 41, ss. 13 to 23 (*agreements with seamen*); ss. 24 to 27 (*their wages and discharge*); ss. 28 to 35 (*their discipline*); and

ss. 43 to 45 (*their health*). See also (as to boy apprentices in the *sea service*) 17 & 18 Vict. c. 104, ss. 141—145; (and in the *sea-fishing service*) 46 & 47 Vict. c. 41.

39 & 40 Vict. c. 80, s. 6, as amended by the 42 & 43 Vict. c. 72, 50 Vict. c. 4, 53 & 54 Vict. c. 9, and 55 & 56 Vict. c. 37, it is provided, that (in effect) whenever the Board of Trade has reason to believe, on complaint or otherwise, that any British ship is by reason of the defective condition of her hull, equipments, or machinery, or of her overloading or improper loading,—or, now, by reason of undermanning (*d*),—unfit to proceed to sea without serious danger to human life, having regard to the service for which she is intended, the Board may direct that the ship shall be provisionally detained, as an unsafe ship, for the purpose of being surveyed by some competent person; and on his report, the Board may make such further order as it shall think requisite, either as to the detention of the ship or as to her release, and either absolutely or upon such conditions as the Board may impose (*e*). And, if, upon such survey, it is reported by the “Court of Survey” having cognizance of the case, that is to say, by the “Wreck Commissioner,” that there was not reasonable and proper cause for the provisional detention of the ship, the Board of Trade is made liable to pay the owner his costs, and also compensation for any loss or damage sustained in consequence of the detention; but if the report be to the effect that the ship was unsafe, then the Board of Trade is to have its costs from the owner, which costs are made recoverable as salvage and otherwise (*f*). And it is further enacted, by sect. 457 of the Act of 1894, continuing the like provisions contained in the 39 & 40 Vict. c. 80, s. 4, that a master who shall knowingly take, and an owner who shall send or attempt to send, a ship to sea, in such an unseaworthy state as is likely to endanger the life of any seaman or other person, shall be guilty of an indictable *misdemeanor*,—unless he proves, either that he used all reasonable means

(*d*) 60 & 61 Vict. c. 59.

(*f*) Sect. 460.

(*e*) *Lewis v. Gray*, 1 C. P. D. 452.

to ensure her being sent to sea seaworthy, or that her going to sea in an unseaworthy state was, under the circumstances, reasonable and justifiable.

The Act of 1894, in continuance of the like provisions contained in the earlier Merchant Shipping Acts, has further provided, that there shall be, in the port of London, a "General Register and Record Office for Seamen" (*g*); and that, as regards every foreign-going ship, the master thereof shall, within forty-eight hours after her arrival at her final port of destination in the United Kingdom, or upon discharge of the crew, (whichever first happens,) deliver, to the Superintendent of the Mercantile Marine Office before whom the crew is discharged, a list containing, *inter alia*, the number and date of the ship's register and her registered tonnage; the length and general nature of her voyage or employment; the names, ages, and places of birth of the master, the crew, and the apprentices; their ratings on board their last ships or other employment; and the dates and places of their joining the ship; and further, that as regards every home-trade ship, the master or owner thereof shall, every half-year, that is to say, on or within twenty-one days after the 30th June and 31st December in each year, transmit or deliver to some Mercantile Marine Superintendent in the United Kingdom, a similar list for the preceding half-year: and that all such lists, together with other documents in the Acts particularized, shall be transmitted, by the Superintendents by whom they have been received, to the "Registrar-General of Shipping and Seamen"; to be by him recorded and preserved, and produced to any person desirous of inspecting the same (*h*). And in addition to all these provisions, it is further directed, that there shall be transmitted, by the proper authorities, every half year, that is to say, on or before

(*g*) 57 & 58 Vict. c. 60, s. 251.

(*h*) Sects. 253, 256.

the 1st day of February and 1st day of August in every year, to such Registrar-General a list of all ships which shall be registered in any port in the United Kingdom, and also of all ships whose registers have been transferred or cancelled in such port since the last preceding return; and the registrars of shipping make monthly, and may be required to make even shorter, returns of the like particulars of transfer (*i*).

IV. THE LAWS RELATING TO PILOTAGE.—These laws apply to the United Kingdom only (*k*), being municipal laws; and as regards such laws, the Merchant Shipping Act, 1894 (*l*), recognizes and confirms the powers and jurisdictions theretofore lawfully exercised by various bodies of persons in different parts of the kingdom, with regard to the appointment and regulation of pilots for the districts for which they respectively act. These bodies have been commonly called “Pilotage Authorities”; and the most important of them is the Trinity House of Deptford Strond; which is a company of masters of ships, incorporated in the reign of Henry the Eighth, and charged under many successive charters and Acts of Parliament with numerous duties relating to the marine. And where there is no such authority already existing, for any place or district in the United Kingdom, the Board of Trade constitutes the pilotage authority, and fixes its district (in which new district, however, there is no *compulsory* pilotage) (*m*).

The “Pilotage Authorities” (*n*) are severally enabled, by bye-laws to be made with the consent of her Majesty in council, to determine the qualifications to be required from persons applying to them to be licensed as pilots,—whether in respect of their age, skill, time of service,

(*i*) 57 & 58 Vict. c. 60, s. 63.

(*m*) Sect. 575.

(*k*) Sect. 572.

(*n*) Sect. 581.

(*l*) Sects. 573, 574.

character, or otherwise ; and to issue licences, accordingly, to such persons as are qualified ; and to make regulations, for the government of the pilots they so license (*o*), including the withdrawal or suspension of any licence, and the terms upon which any special licence may be granted ; and they are required to deliver periodically to the Board of Trade returns, comprising (among other particulars) the names and ages of all pilots or apprentices acting under their authority, and the nature of the service for which each is licensed (*p*) ; and these returns are laid by the Board of Trade, without delay, before both houses of parliament (*q*). And every pilotage authority may, by bye-law made with the consent of her Majesty in council, exempt (within the limits of its own district) the masters of any ships, or of any classes of ships, from being compelled to employ qualified pilots (*r*) ; and the Board of Trade also may, by provisional order confirmed by parliament, exempt masters from being obliged to employ pilots in any, or in any part of any, pilotage district (*s*). Also, the master or mate of any ship may apply to any pilotage authority, to be examined as to his capacity to pilot the ship to which he belongs, or any one or more ships belonging to the same owner, within any part of the district of such pilotage authority ; and if he is found competent, a pilotage certificate is granted, to enable him to pilot such ships himself within the limits therein described, without incurring a penalty for failing to employ a qualified pilot (*t*). But every master of a ship not so *exempted* navigating within any district, who, after a qualified pilot has offered to take charge of her or has made a signal for that purpose, either himself pilots the ship without possessing a pilotage certificate enabling him

(*o*) 57 & 58 Vict. c. 60, s. 582 ;
Henry v. Newcastle Trinity House
Board, 8 Ell. & Bl. 723.

(*p*) Sect. 585.

(*q*) Sect. 585.

(*r*) Sect. 581.

(*s*) Sect. 578.

(*t*) Sect. 599.

to do so, or employs or continues to employ an unqualified person to pilot her, incurs for every such offence a penalty of double the amount of pilotage demandable for the conduct of such ship (*u*) ; and the like penalty is incurred by the master of an *exempted* ship, who, under the like circumstances, employs or continues to employ an unqualified person to pilot her.

With regard to the Trinity House in particular, that pilotage authority is allowed to appoint and license pilots for the limits following, that is to say,—(1.) “The London District,” comprising the waters of the Thames and Medway, as high as London Bridge and Rochester Bridge respectively, and the seas and channels leading thereto or therefrom, as far as Orfordness to the north and Dungeness to the south, but so nevertheless that no pilot shall be licensed to conduct ships both above and below Gravesend ; (2.) “The English Channel District,” comprising the seas between Dungeness and the Isle of Wight ; and (3.) “The Trinity House Outport Districts,” comprising any pilotage district, for the appointment of pilots within which no particular provision is made by Act of Parliament or charter (*x*). And, as a general rule, the employment of pilots in the first and third of these districts is compulsory (*y*), subject to a penalty (*z*), and subject to this, that certain classes of ships, *when not carrying passengers* (*a*), are exempted from compulsory pilotage in the London District and the Trinity House Outport Districts, that is to say,—(1.) Ships employed in the coasting trade of the United Kingdom ; (2.) Ships of no more than sixty tons burthen ; (3.) Ships trading from any port in Great

(*u*) 57 & 58 Vict. c. 60, s. 603 ;
The Queen v. Stanton, 8 Ell. & Bl.
 445 ; *The Tyne Improvement Com-*
missioners v. The General Steam
Navigation Company, Law Rep.,
 2 Q. B 65.

(*x*) Sect. 618.

(*y*) Sect. 622 ; *The Hanna*,
 Law Rep., 1 Adm. & Ecc. 283.

(*z*) Sect. 622.

(*a*) *The Lion*, Law Rep., 2
 Adm. & Ecc. Ca. 102¹

Britain within the London District or any of the Trinity House Outport Districts to the port of Brest in France, or to any port in Europe north and east of Brest (*b*), or to the Channel Islands or Isle of Man ; (4.) Ships trading from the port of Brest or any port in Europe north or east of Brest, or from the Channel Islands or Isle of Man, to any port in Great Britain within the London District or the Trinity House Outport Districts ; and (5.) Ships navigating within the limits of the port to which they belong (*c*). And the Merchant Shipping Act contains also a general provision, to the effect that no owner or master of any ship shall be answerable to any person whatever, for any loss or damage exclusively occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law (*d*).

V. THE LAWS RELATING TO LIGHTHOUSES, BEACONS, AND SEAMARKS.—By our law, the power of erecting, placing, and maintaining lighthouses, beacons, and sea-marks is incident to the royal prerogative (*e*) ; but by the 8 Eliz. c. 13, it was specially committed to the Trinity House ; and the authority of this corporation was subsequently confirmed and also regulated by successive statutes, and principally by the earlier Merchant Shipping Acts. And now, by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), it is provided, that, subject to the particular provisions of the Act and subject to any powers or rights theretofore lawfully exercised by any person or

(*b*) Save between Sweden (or Norway) and London (60 & 61 Vict. c. 61).

(*c*) 57 & 58 Vict. c. 60, s. 625.

(*d*) Sect. 633 ; *Tyne Improvement Commissioners v. General Steam Navigation Company*, Law Rep., 2 Q. B. 65 ; *Moss v. The*

African Steamship Company, *ib.* 2 P. C. Ca. 238 ; *The Lion*, *ib.* 525 ; *Clyde Navigation Company v. Barclay*, 1 App. Ca. 790 ; *The Princeton*, 3 P. D. 90 ; *The Mary*, 5 P. D. 14.

(*e*) *Vide sup.* vol. II. p. 438.

body of persons having authority over *local* lighthouses, buoys, or beacons,—and who in and by the Act are styled “Local Lighthouse Authorities,”—the superintendence and management of all lighthouses, buoys, and beacons shall be vested (for England, Wales, Jersey, Guernsey, Sark, and Alderney, and the adjacent seas and islands, and for Gibraltar, and formerly Heligoland) in the *Trinity House*, and (for Scotland and the adjacent seas and islands, and the Isle of Man) in the *Commissioners of Northern Lighthouses*, and (for Ireland and the adjacent seas and islands) in the *Commissioners of Irish Lights*; which three bodies are distinguished from the “Local Lighthouse Authorities” by the name of the “General Lighthouse Authorities” (*f*), every General Lighthouse Authority regulating, within its own jurisdiction, and with the sanction of the Board of Trade, the proceedings of the local lighthouse authority or authorities (*g*), and being itself subject to the regulations of the Board of Trade. And the Act gives power to each General Lighthouse Authority, within its own jurisdiction, to erect or make new lighthouses, buoys, or beacons, and to alter or remove existing ones, and to vary the character of any lighthouse, or the mode of exhibiting lights therein (*h*). But these powers are not to be exercised, in the case of the General Lighthouse Authorities for Scotland or Ireland, without the sanction of the Trinity House, and the approval of the Board of Trade (*i*); and the *Trinity House* may, with the previous sanction of the Board of Trade, direct these two last-mentioned General Lighthouse Authorities, within their respective jurisdictions, to continue any existing lighthouses, buoys, or beacons, and to erect or place, alter or remove, any new

(*f*) 57 & 58 Vict. c. 60, s. 634.

(*g*) Sect. 652.

(*h*) Sect. 638. And see the 61 & 62 Vict. c. 44, whereby certain of the expenses relating

to lighthouses, buoys, and beacons have been transferred from the *Mercantile Marine Fund* to the *General Lighthouse Fund*.

(*i*) Sect. 638.

ones, and to vary the character of any lighthouse, or the mode of exhibiting lights therein (*k*).

The Act also provides, that upon the completion of any new lighthouse, buoy, or beacon, her Majesty may, by order in council, fix reasonable *dues* to be paid by the master or owner of every ship passing, or deriving benefit from, the same (*l*) ; but no such dues in Guernsey, Jersey, Sark, or Alderney, are to be taken without the consent of the States of those Islands respectively ; and the powers given to the Trinity House in respect of any lighthouse, buoy, or beacon, placed or hereafter to be placed in Guernsey or Jersey, are to be exercised only with the consent of her Majesty in council (*m*).

The Act contains also provisions for the punishment of all persons wilfully or negligently injuring any lighthouse, buoy, or beacon, or removing, altering, or destroying any light-ship, buoy, or beacon, or riding by, making fast to, or running foul of, any light-ship or buoy, or burning or exhibiting (after being duly warned to the contrary by notice from the proper General Lighthouse Authority) any fire or light so placed as to be liable to be mistaken for a light proceeding from a lighthouse (*n*). And by sects. 530 and 531, in continuance of the like provisions contained in the 40 & 41 Vict. c. 16, s. 5 (The Removal of Wrecks Act, 1877), as amended by the 52 & 53 Vict. c. 5, the proper general Lighthouse Authority is to remove any wreck which is or is likely to become an obstruction or danger to navigation,—this duty being, however, (in the case of wreck in any harbour,) placed on the harbour commissioners, and (in the case of wreck in any tidal river) on the river conservancy board (*o*).

(*k*) 57 & 58 Vict. c. 60, s. 641.

(*l*) Sect. 644.

(*m*) Sect. 669.

(*n*) Sects. 666, 667.

(*o*) The marine insurance society called Lloyd's is, by Lloyd's Signal Stations Act, 1888 (51 & 52 Vict. c. 29, authorized to erect signal

VI. THE LAWS RELATING TO THE LIABILITY OF SHIP-OWNERS.—Formerly, while discussing the law of carriers, we had occasion incidentally to state the nature and extent of a shipowner's responsibility for loss or damage to *goods* on board his ship for carriage (*p*): and we have to add, that, a shipowner as a general rule is liable also for any injury to the passengers in his ship, being responsible generally for the way in which his ship is managed by those whom he employs, in the same way that an ordinary master is liable for the conduct of his servants (*q*). But a limit is placed by statute to the amount of damages recoverable from a shipowner who is *personally* blameless, it being provided by sect. 503 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), in continuance of the like provision contained in the 25 & 26 Vict. c. 63, s. 54 (*r*), that, in case loss arises without his actual fault or privity, the owner of any ship (whether British or foreign) shall not be answerable in damages, in respect of loss of life or personal injury (either alone or together with loss or damage to property), to an aggregate amount exceeding *fifteen* pounds for each ton of the ship's tonnage; nor in respect of injury to property (whether there be in addition loss of life or personal injury or not), to an aggregate amount exceeding *eight* pounds for each ton of such tonnage (*s*). And by way of making further provision for the protection of shipowners, it has been further enacted (*t*), that in all cases where several claims are made

stations and signal houses, and to establish telegraphic communication therewith, subject to the approval of the Board of Trade, and to acquire lands for the purpose; but (by sect. 10) no such erection is to be made which, in the opinion of the general lighthouse authority of the place, would interfere with any lighthouse, beacon, or seamark.

(*p*) *Vide sup.* vol. II. p. 89.

(*q*) *Steel v. Lester*, 3 C. P. D. 121.

(*r*) *The Obey*, Law Rep., 1 Adm. & Ecc. 102; *The Northumbria*, *ib.* 3 Adm. & Ecc. 6, 24; *Smith v. Kirby*, 1 Q. B. D. 131.

(*s*) *Glaholm v. Barker*, Law Rep., 1 Ch. App. 223; *Th Bernina*, 13 App. Ca. 1.

(*t*) 57 & 58 Vict. c. 60, s. 504; amended by the 61 & 62 Vict. c. 14.

or apprehended against any owner for compensation,—whether for loss of life or personal injury, or for the loss or damage of ships, boats, or goods,—proceedings may be instituted at the suit of the owner for the purpose of determining his aggregate liability, and the court may distribute the amount rateably among the several claimants, and may stay all other proceedings in relation to the same subject-matter (*u*). With regard, however, to all these provisions of the Merchant Shipping Act, it is material to observe that none of them is to lessen or take away any liability to which any *master* or *seaman*, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman (*x*).

With a view to the protection of shipowners from the multiplicity of actions to which (it was supposed) a single shipping casualty might otherwise have exposed them, where loss of life or other personal injury had resulted, or was alleged to have resulted, to several persons with different claims and rights, the Merchant Shipping Act, 1854 (*y*), provided as follows, that is to say:—By direction of the Board of Trade the sheriff summoned a jury to inquire into the number, names, and descriptions of all persons killed or injured on board the ship by reason of the wrongful act, neglect, or default; and at this inquiry the sheriff presided, the Board of Trade being plaintiff, and the shipowner defendant. If the verdict was for the defendant, his costs were paid by the Board of Trade; but if for the plaintiff, then damages were assessed at 30*l.* for each case of death or personal injury; and the aggregate amount was paid to her Majesty's paymaster-general, and was distributed by him as the Board of Trade directed, the Board having power to direct payment to each person injured—or in case of death, to the husband, wife, parent,

(*u*) *The Franconia*, 3P. D. 164.

(*y*) 17 & 18 Vict. c. 104, ss. 507

(*x*) 57 & 58 Vict. c. 60, s. 508, *et seq.*

amended by the 61 & 62 Vict. c. 14.

or child of the deceased—of such compensation, (not exceeding in any case the statutory amount,) as the Board thought fit ; and the Act provided, that until that inquiry had been instituted,—or until the Board had (for one month after notice by a claimant) refused to institute it—no person should commence any legal proceeding, in respect of his claim for loss of life or personal injury arising out of any such accident : but after completion of the inquiry, if any person injured (or, in case of death, his or her personal representative) estimated the damages in respect of such injury at a greater sum than the statutory amount, or such amount as the Board of Trade had accepted by way of compromise,—he or she was at liberty, upon repayment to the shipowner of the amount paid, to bring an action for damages in the ordinary way, any damages which he or she recovered in such action being, however, payable only out of the residue (if any) of the aggregate amount aforesaid ; and if such damages did not exceed double the statutory amount, the plaintiff bringing such action had to pay to the defendant the costs of the action, as between solicitor and client. The Merchant Shipping Act, 1894, has, however, repealed all these peculiar provisions, and has not re-enacted any similar provisions in their place,—so that the special mode of procedure lastly before described must now be regarded as obsolete, and the ordinary procedure in the Court of Admiralty, or (as the case may be) in other the appropriate division of the High Court, must for the future be resorted to in all such cases (z).

VII. THE LAWS RELATING TO FISHERIES.—There are a great many statutes relating to fisheries, and providing for their maintenance and development (a) ; and in

(z) *The Bernina*, 13 App. Ca. 1.

(a) *Bounties* were formerly payable upon the taking and curing of certain kinds of fish, and upon the vessels employed in these

industries ; but all such bounties have long been repealed. (1 & 2 Geo. 4, c. 79 ; 5 Geo. 4, c. 64 ; 7 Geo. 4, c. 34.)

particular for the protection of the breed of fish, and for the prevention of practices tending to destroy the spawn or fry; and providing also (in the case of the sea-fisheries) for the protection and safety of the persons engaged in this peculiarly hazardous occupation, and for their moral and spiritual welfare (*b*). The principal of these statutes are the following: 18 Geo. III. c. 33; 44 Geo. III. c. xlv; 46 Geo. III. c. xix; 9 Geo. IV. c. 39; 7 & 8 Vict. c. 95; 8 & 9 Vict. c. 26; 10 & 11 Vict. cc. 91, 92; 14 & 15 Vict. c. 26; 21 & 22 Vict. c. cxli; 23 & 24 Vict. c. 92; 24 & 25 Vict. cc. 72, 109; 25 & 26 Vict. c. 97; 26 & 27 Vict. c. 50; 27 & 28 Vict. c. 118; 28 & 29 Vict. cc. 22, 121; 30 & 31 Vict. c. 52; 31 & 32 Vict. c. 45; 32 & 33 Vict. c. 31; 36 & 37 Vict. c. 71; 38 & 39 Vict. c. 15; 39 & 40 Vict. cc. 19, 34, 36, s. 100; 40 & 41 Vict. cc. 42, 65; 41 & 42 Vict. c. 39; 42 & 43 Vict. cc. 26, 67; 47 Vict. c. 11; 47 & 48 Vict. c. 26; 49 Vict. c. 2; 49 & 50 Vict. c. 39; 50 & 51 Vict. c. 4; 51 & 52 Vict. c. 54; 54 & 55 Vict. c. 37; 55 & 56 Vict. c. 50; and 57 & 58 Vict. c. 26 (*c*). And in addition to these Acts (which are more or less general), there are also numerous Acts of a special and local character, regulating particular local fisheries, or regulating specific fishing industries, or the trade in specific fish, or the trade in fish of particular towns and places. Thus, the trade in fish, as regards the cities of London and Westminster, is governed by the statutes 2 Geo. III. c. 15; 9 & 10 Vict. c. cccxvi; and 22 & 23 Vict. c. 29,—the general object of which Acts is

(*b*) See 51 & 52 Vict. c. 18, and 56 & 57 Vict. c. 17, being Acts for the regulation of the liquor traffic among fishing boats and fishermen engaged in the North Sea, and enforcing certain conventions in that behalf entered into by this country with Belgium, Holland, Denmark, and Germany, in 1887; and see also the general provisions

contained in 57 & 58 Vict. c. 60, ss. 369—417.

(*c*) The Acts 44 & 45 Vict. c. 11 (as to *clam* and *bait*), and 47 & 48 Vict. c. 20 (as to *oysters*, *crabs*, and *lobsters*), are repealed by the 51 & 52 Vict. c. 54; and the Northumberland herring fishery is now subject to the 54 & 55 Vict. c. 28.

to secure a supply of fresh fish to those cities, and to prevent the same being forestalled.

And the fisheries of *Ireland* (in particular) are now regulated by the 5 & 6 Vict. c. 106 ; 7 & 8 Vict. c. 108 ; 8 & 9 Vict. c. 108 ; 9 & 10 Vict. cc. 3, 86 ; 11 & 12 Vict. c. 92 ; 13 & 14 Vict. c. 88 ; 26 & 27 Vict. c. 114 ; 29 & 30 Vict. c. 45 ; 32 & 33 Vict. cc. 9, 92 ; and 37 & 38 Vict. c. 86. And as regards the seas between the United Kingdom and France, the fisheries therein are regulated by the conventions between this country and France that were entered into respectively in 1839 and 1867, and which are enforced respectively (so far as regards the subjects of the Queen) by the 6 & 7 Vict. c. 79, and 31 & 32 Vict. c. 45, and by the Acts amending the same Acts respectively. And as regards the North Sea (*i.e.*, the seas between the shores of England and Scotland on the one hand, and Belgium, Holland, Denmark, and Germany on the other hand), the fisheries therein are regulated by the convention entered into between these several countries in 1882, and which is enforced (so far as regards the subjects of the Queen) by the 46 & 47 Vict. c. 22. Treaties also exist between her Majesty and the United States of America, relating to (*inter alia*) the rights of fishery off Newfoundland, &c., as between the British North American colonies and the United States ; and such treaties were carried into effect by the 18 & 19 Vict. c. 3 ; 35 & 36 Vict. c. 45 (specially enforcing the treaty of Washington of May 8, 1871) ; and 38 & 39 Vict. c. 52. And there is also the treaty relative to the Behring Sea Seal Fishery, which was prepared for by the 54 & 55 Vict. c. 19, and is now enforced under the provisions of the 56 & 57 Vict. c. 23, and 57 & 58 Vict. c. 2 ; and this particular fishery has been further regulated by the 58 & 59 Vict. c. 31 (whereby a close time, in effect, has been established).

All these various fishery laws have relation either to what are called Freshwater Fisheries (including Salmon

Fisheries) or to what are called Sea Fisheries. The Acts relating to freshwater fish generally (other than trout and char) are the 41 & 42 Vict. c. 39, 47 & 48 Vict. c. 11, and 55 & 56 Vict. c. 50; and the Acts relating to trout and char are 28 & 29 Vict. c. 121; 36 & 37 Vict. c. 71; 39 & 40 Vict. c. 19; 41 & 42 Vict. c. 39; 47 & 48 Vict. c. 11; and 55 & 56 Vict. c. 50 (*d*); and the Acts specially relating to salmon, and which are called the "Salmon Fishery Acts, 1861 to 1892" (*e*), are 24 & 25 Vict. c. 109; 28 & 29 Vict. c. 121; 36 & 37 Vict. c. 71; 49 & 50 Vict. c. 39; and 55 & 56 Vict. c. 50. The Acts relating to the sea fisheries are the other Acts above specified,—some of these (and in particular 31 & 32 Vict. c. 45; 32 & 33 Vict. c. 31; and 38 & 39 Vict. c. 15) relating more especially to oysters, and others of them (and in particular 40 & 41 Vict. c. 42; and 47 & 48 Vict. c. 46) relating more especially to crabs and lobsters (*f*); and as regards all sea-fish (including lobsters, crabs, shrimps, prawns, oysters, mussels, cockles, and other kinds of shell-fish, but not, of course, salmon), and all sea fisheries, provision has now been made by 51 & 52 Vict. c. 54, and 54 & 55 Vict. c. 37, for the establishment (for the better regulation of the industries connected therewith) of sea-fisheries districts and local fisheries committees, with power to make bye-laws (subject to the approval of the Board of Trade) relating to such fisheries, but so always as not to interfere with any salmon conservancies or harbour boards.

(*d*) *Price v. Bradley*, 16 Q. B. D. 148.

(*e*) *Leconfield v. Lonsdale*, Law Rep., 5 C. B. P. 657; *Watts v. Lucas*, *ib.* 6 Q. B. 226; *Holford v. George*, *ib.* 3 Q. B. 639.

(*f*) And see 39 & 40 Vict. c. 36, providing (sect. 48) for the free

import of lobsters, &c., in British ships without report or entry. See also 38 & 39 Vict. c. 18 (as to the *seal* fisheries off the coast of Greenland); and the 57 & 58 Vict. c. 2, and 58 & 59 Vict. c. 21 (as to the *seal* fisheries in Behring Straits).

CHAPTER IX.

OF THE LAWS RELATING TO THE SANITARY
CONDITION OF THE PEOPLE.

THE attention of the legislature has been at various times directed to the health of the people,—more often than not after the occurrence of some epidemic, and for the purpose of averting its course or mitigating its effects ; but latterly legislation of a more preventive character has been copiously resorted to, and with the best remedial effects. Among the earliest enactments relating to the health of the people, may be instanced the stat. 1 Jac. I. c. 31, regarding the *Plague*,—under which statute, it was a capital felony for any person having a plague sore upon him uncured to go abroad and converse in company, after being commanded by the proper authorities to keep his house ; but the statute has been repealed (*a*), the epidemic to which it was alone applicable not having again visited this island for now nearly 300 years.

The laws relating to *quarantine* are the next of the sanitary laws of an early date of which mention may properly be made,—*quarantine* being the term applied to that period of probation during which vessels arriving from countries infected with certain contagious disorders are placed in restraint by the law. All countries have more or less adopted some law of quarantine ; the earliest known, quarantine law being the edict of Justinian, A.D. 542 ; and in our own country, the first statute on the subject was 9 Anne, c. 2 ; but that statute, with several others

(*a*) 7 Will. 4 & 1 Vict. c. 91, s. 4.

passed for its amendment in the reigns of George the First and George the Second, was repealed by the 6 Geo. IV. c. 78; which latter statute consolidated the whole law of quarantine, and enacted that all vessels, as well of war as others, coming from any place whence the crown, by the advice of the privy council, should have adjudged it probable that the plague or other infectious disease of a highly dangerous kind might be brought,—and all vessels and boats receiving persons or goods out of the same, and all persons and goods on board the vessels so arriving, or so receiving as aforesaid,—should be liable to, “quarantine,” within the meaning of the Act and of any order or orders in council concerning quarantine; and they should be obliged to perform quarantine, in such place or places, (known by the name of *lazarets*), for such time and in such manner, as should from time to time be directed by order in council, notified by proclamation or published in the London Gazette; and until they should have been discharged from such quarantine, they should not come on shore, or be put on board any other vessel or boat, except in such cases, and by such licence, as the order in council might direct (*b*); and for breach of quarantine, either as to persons or as to goods, the offender was visited with a heavy fine; and was besides punishable with imprisonment for six months (*c*); but the privy council might, in any individual case, shorten the period of quarantine, or absolutely release therefrom any particular vessels, persons, or goods (*d*). The Act provided also (among other things), that the lords of the privy council, or any two of them, might make such order as they should think necessary upon any unforeseen emergency, or in any particular case, with respect to any vessel or goods arriving with an infectious disease on board, or arriving under any suspicious circumstances as to infection;

(*b*) 6 Geo. 4, c. 78, s. 2.

(*d*) Sect. 6.

(*c*) Sects. 17, 26.

and that the lords of the privy council might make the like order in the case of any infectious disease or distemper breaking out in the United Kingdom, so as to isolate all persons afflicted therewith from the rest of the community. But the 6 Geo. IV. c. 78 has been repealed by the 59 & 60 Vict. c. 19 (the Public Health Act, 1896), which has extended to the ports and harbours of the realm the provisions (as to “epidemic, endemic, and infectious diseases”) which are contained in the Public Health Acts, 1875 to 1893, hereinafter mentioned,—the matter being also further provided for by the 59 & 60 Vict. c. 20 (the Public Health, Ports, Act, 1896).

In the year 1832, on the occasion of the outbreak in this kingdom of the Asiatic *cholera*, the statute 2 & 3 Will. IV. c. 10 empowered the privy council to issue such orders as might appear to them expedient, with a view to prevent the spread of the disease, and for the relief of persons afflicted thereby, and for the interment of its victims; and this Act was continued by the 3 & 4 Will. IV. c. 75, until the end of the then next session of parliament; but was not further continued,—its further continuance having become unnecessary by the disappearance of the epidemic, and by the establishment of those more general provisions for the prevention of disease, of which we shall presently give some account.

The prevention of *small-pox* also has long been a subject of special legislation. In 1840 and 1841 (*e*) parliament, adopting the well-established results of Jenner’s discoveries, forbade inoculation for small-pox, and provided for the gratuitous vaccination of all who wished for it. In 1853 (*f*) the vaccination of children within three months of birth was first made compulsory under penalties, and vaccination stations for arm-to-arm vaccination were provided; and later statutes dealt with the qualifications

(*e*) 3 & 4 Vict. c. 29; 4 & 5 Vict. c. 32.

(*f*) 16 & 17 Vict. c. 100.

of the public vaccinators and enforcement of the law (*g*). In 1867 (*h*) a consolidating, amending, and repealing Act was passed, which first recognised public revaccination ; and the present law is comprised in it with its amending Acts (*i*), especially the Act of 1898, and the Local Government Board's Vaccination Order, 1898. Under this law the several poor law unions and parishes not in union are divided into districts, for each of which the guardians have to contract with a duly registered medical practitioner, called the public vaccinator, to vaccinate or revaccinate all persons resident in his district; and it is his duty to *call at the home* of every unvaccinated and unexcused child in the district between the ages of four months and six months, and offer to vaccinate it with *calf lymph* under certain prescribed safeguards (*k*). The production of small-pox in a person is punishable with one month's imprisonment (*l*). It is the duty of the parent (including custodian) of every child to secure its vaccination before the age of *six* months (*k*) by the public vaccinator, or some other duly qualified medical man, unless the child shall have first had small-pox, or is insusceptible to vaccination, or so circumstanced that its vaccination should be postponed, or unless such parent shall have duly given satisfactory evidence of his conscientious objection to vaccination. It is incumbent on the guardians to appoint a vaccination officer or officers with the power and the duty (*m*) to enforce the law where parents have not shown that they have complied with it or have a legal excuse. A parent in default is liable on summary conviction to a penalty of 20s. for neglect to comply with the general requirement of the law, and to a similar penalty for neglect to comply with a specific order of a justice for the

(*g*) 21 & 22 Vict. c. 97 ; 24 & 25 Vict. c. 59.

(*h*) 30 & 31 Vict. c. 84.

(*i*) 34 & 35 Vict. c. 98 ; 37 & 38 Vict. c. 75 ; 61 & 62 Vict. c. 49.

(*k*) 61 & 62 Vict. c. 49, s. 1 ; Vac. Order, 1898, Sch. 1, 3.

(*l*) 30 & 31 Vict. c. 84, s. 32.

(*m*) *Bramble v. Lowe*, 1 Q. B. 283.

vaccination of a child within a limited period (*n*), but the Act of 1898 is against repeated prosecutions (*o*). The cost of public vaccination and its enforcement is defrayed out of the poor rate ; but public vaccination is not parochial relief, and its acceptance entails no disqualification (*p*).

We come now to consider the more general provisions of the legislature for the preservation and improvement of the public health; and these (especially during the last few years) have been so numerous, and they are also so minute, that it is impossible to do much more than refer the reader generally to the statutes themselves ; and for this purpose, these statutes have been grouped in a note at the end of this chapter. But it will be proper to refer at some length, and specifically, to the Public Health Act, 1875 (38 & 39 Vict. c. 55),—an Act passed to consolidate and amend (and which, at the same time, repeals) the previous statutes on the subject ; and we must first give the reader some information regarding these previous statutes.

There was, firstly, the Public Health Act, 1848 (*q*), under which, on the petition of a certain proportion of the ratepayers of any town, parish, or other place with a known and defined boundary, praying to have the benefit of the Act, an inspector was directed to examine into the facts ; and if he reported in favour of the prayer of the petition, the Act was then applied to such place, either by order in council or by special Act of Parliament ; and the provisions of this Act were afterwards amended by the Local Government Act, 1858 (*r*), and subsequently by the statutes 24 & 25 Vict. c. 61, and 26 & 27 Vict. c. 17 ; and these several statutes (inclusive of the Public Health Act, 1848) are the group of statutes referred to in the Public Health Act, 1875, under the designation of “The Local Government Acts” (*s*).

(*n*) 30 & 31 Vict. c. 84, ss. 29,
31.

(*o*) 61 & 62 Vict. c. 49, ss. 3, 4.

(*p*) 30 & 31 Vict. c. 84, s. 26

(*q*) 11 & 12 Vict. c. 63.

(*r*) 21 & 22 Vict. c. 98.

(*s*) 38 & 39 Vict. c. 55, Sched. V.

Part I.

Secondly, there was the Diseases Prevention Act, 1855 (*m*), whereby (as amended by the 23 & 24 Vict. c. 77, ss. 10—12), it was provided, that from time to time official inquiries should be set on foot as to matters concerning the public health ; and that when any part of England appeared to be threatened with, or to be affected by, any formidable disease (epidemic, endemic, or contagious), the Act might be there put in force,—for the purpose of effecting speedy interments ; and for house to house visitations ; and for the dispensing of medicines, and providing such medical aid and accommodation as might be required,—the execution of the Act being thereby entrusted to the “local authority,” that is to say, to the guardians and overseers of the parish ; but both of these Acts were repealed (except as regards the metropolis) by the Public Health Act, 1875 (*n*), and (as regards the metropolis) by the Public Health (London) Act, 1891 (*o*).

Thirdly, there was the Nuisances Removal Act, 1855 (*p*), whereby (as amended by the 23 & 24 Vict. c. 77, 26 & 27 Vict. c. 117, and 29 & 30 Vict. cc. 41, 90) it was enacted, that the “local authority” established for the execution of the Act should appoint, or join with other local authorities in appointing, for each place a “Sanitary Inspector” or “Inspectors” ; whose duties should be to attend at the meetings of the Board, and, under the instructions of the Board, to examine into nuisances (*q*) ; for which purpose, the local authorities and their officers were empowered to enter upon and to examine any premises as to which any suspicion of nuisance existed or complaint was made (*r*) ; to inspect all articles of food

(*m*) 18 & 19 Vict. c. 116.

(*q*) 18 & 19 Vict. c. 121, s. 8.

(*n*) 38 & 39 Vict. c. 55.

(*r*) *Cocker v. Cardwell*, Law Rep., 5 Q. B. 15.

(*o*) 54 & 55 Vict. c. 76.

(*p*) 18 & 19 Vict. c. 121.

exposed for sale, or in the course of carriage or preparation for sale or use (*s*) ; and also to summon any offender before the justices, and to obtain an order requiring the abatement or discontinuance of any nuisance found on any premises, or the destruction of any article of food unfit for the food of man (*t*). But all these Acts were repealed (except as regards the metropolis) by the Public Health Act, 1875, and (as regards the metropolis) by the Public Health (London) Act, 1891.

Fourthly, the carrying out of the Public Health Act, 1848, having been originally entrusted to certain commissioners called “the General Board of Health,” and that Board having ceased to exist in the year 1858, when certain of its duties were transferred to the Home Department, and others of them to the Privy Council,—in the year 1871, it was considered desirable to concentrate, in a single department of the government, the supervision of the laws relating to (among other matters) the public health and local government ; and accordingly, by the Local Government Board Act, 1871 (*u*), a permanent board, called the Local Government Board, was established ; and in such board were vested (among other powers and duties) all the powers and duties theretofore vested in or imposed upon the Home Department, or the Privy Council, with reference to the Local Government Acts and the Diseases Prevention Act, 1855. And shortly after the establishment of the Local Government Board, there was passed the Public Health Act, 1872 (*x*), under which (as amended by the 37 & 38 Vict. c. 89) England was divided into *urban sanitary districts* and *rural sanitary districts*,—

(*s*) *Young v. Grattridge*, Law Rep., 4 Q. B. 166.

(*t*) 18 & 19 Vict. c. 121, ss. 12—27 ; *Ex parte The Mayor of Liverpool*, 8 Ell. & Bl. 537 ; *The*

Queen v. Cotton, 1 E. & E. 203 ; *Amys v. Creed*, Law Rep., 4 Q. B. 122.

(*u*) 34 & 35 Vict. c. 70.

(*x*) 35 & 36 Vict. c. 79.

the former consisting of all boroughs, Improvement Act districts, and local government districts (*y*); and the latter consisting of such poor law unions as were not coincident in area with, or wholly included in, any urban district (*z*). And the statute directed, that every urban sanitary district should be subject to local authorities called “urban sanitary authorities”; and that every rural sanitary district should be subject to “rural sanitary authorities”; and there were transferred to such *urban* authority (among other powers and duties) all the powers, rights, and duties of a “local board” under the Local Government Acts, and of the “nuisance authority” under the Nuisances Removal Act (*a*); and there were transferred to each *rural* authority (among other powers and duties) all the powers, rights, and duties of any authority under the Nuisances Removal Acts and the Diseases Prevention Acts. But both these Acts of 1872 and 1874 were repealed (except as regards the metropolis) by the Public Health Act, 1875, and (as regards the metropolis) by the Public Health (London) Act, 1891.

And we are now brought to the Public Health Act, 1875 (38 & 39 Vict. c. 55) and to the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76) (*b*). Now the Public Health Act, 1875,—which has been recently amended by the Public Health Act, 1890 (53 & 54 Vict. c. 59) and other Acts,—adopts the division of England into urban sanitary districts and rural sanitary districts as established by the repealed Public Health Act, 1872; and entrusts to the respective sanitary *authorities* of these districts the carrying out of the *sanitary* provisions of the Act,—with regard to sewers

(*y*) 35 & 36 Vict. c. 79, s. 60.

(*z*) Sect. 5.

(*a*) Sect. 7.

(*b*) Both these Acts have been amended by the Public Health

Act, 1896 (59 & 60 Vict. c. 19), and by the Public Health (Ports) Act, 1896 (59 & 60 Vict. c. 20), as regards those diseases which were formerly subject to *quarantine*.

and drains ; the cleansing of streets and removal of refuse ; the supply of water ; the regulation of lodging-houses ; the suppression of nuisances, and similar matters ; and also the *local government* provisions of the Act,—with regard to the regulation of highways ; the paving and lighting of streets and buildings ; providing public pleasure-grounds, markets, and slaughter houses ; making bye-laws for licensing horses and boats for hire, and other like matters ; and the local authority is to execute, or see to the execution of, the measures referred to in the Diseases Prevention Act, 1855, for “the prevention of diseases” ; and is also to cause nuisances to be abated, in the same general way as previously under the Nuisances Removal Act, 1855. And the Public Health (London) Act, 1891,—which has been amended by the 56 & 57 Vict. c. 47,—adopts for the metropolis (that is to say, for the administrative county of London) the pre-existing sanitary authorities, that is to say, for the city of London, the Commissioners of Sewers ; for the port of London, the Mayor, Commonalty, and citizens of the city ; for each of the metropolitan parishes (other than Woolwich, and other than parishes aggregated into districts), the vestry of the parish ; for Woolwich, the local board of health ; for each district of aggregated parishes, the district board of health ; and for certain liberties or privileged parts of London, the guardians of the poor, or poor law union (*c*), as the sanitary authorities for the execution of the Act ; and entrusts to such authorities respectively all the like powers and duties as (under the Public Health Act, 1875) are entrusted to the sanitary authorities thereby constituted, and which are above enumerated or referred to,—besides certain other powers and duties more immediately applicable to the

(*c*) 54 & 55 Vict. c. 76, s. 99 tively the Metropolis Management
 (referring to the 18 & 19 Vict. Acts, 1855, 1885, and 1887) ; 56 &
 c. 120 ; 48 & 49 Vict. c. 33 ; and 57 Vict. c. 55.
 50 & 51 Vict. c. 17,—being respec-

circumstances of the metropolis ; *e.g.*, powers relative to bakehouses and unsound food ; waterclosets and refuse ; smoke consumption ; underground rooms ; and in addition thereto, some very special powers as to infectious diseases (their notification, treatment, and prevention) (*d*).

(*d*) The following enactments are more or less immediately connected with the public health :—

Accidents affecting Life.—57 & 58 Vict. c. 28 ; 60 & 61 Vict. c. 60.

Adulteration.—35 & 36 Vict. c. 74 ; 42 & 43 Vict. c. 30 ; 56 & 57 Vict. c. 56.

Alkali Works.—26 & 27 Vict. c. 124 ; 31 & 32 Vict. c. 36 ; 35 & 36 Vict. c. 79, s. 35 ; 37 & 38 Vict. c. 43 ; 44 & 45 Vict. c. 37 ; 55 & 56 Vict. c. 30.

Arsenic (Sale of).—14 & 15 Vict. c. 13.

Artizans' Dwellings.—38 & 39 Vict. c. 36 ; 42 & 43 Vict. cc. 63, 64 ; 43 & 44 Vict. c. 8 ; 45 & 46 Vict. c. 54 ; 48 & 49 Vict. c. 72 ; 53 & 54 Vict. cc. 16, 70 ; 57 & 58 Vict. c. 55.

Bakehouses.—26 & 27 Vict. c. 40.

Baths.—9 & 10 Vict. c. 74 ; 10 & 11 Vict. c. 61 ; 41 & 42 Vict. c. 14 ; 45 & 46 Vict. c. 30 ; 59 & 60 Vict. c. 59.

Boiler Explosions.—45 & 46 Vict. c. 22 ; 53 & 54 Vict. c. 35.

Burials.—15 & 16 Vict. c. 85 ; 16 & 17 Vict. c. 134 ; 17 & 18 Vict. c. 87 ; 18 & 19 Vict. c. 79 ; c. 105, ss. 11—13 ; c. 128 ; 20 & 21 Vict. c. 81 ; 22 Vict. c. 1 ; 23 & 24 Vict. c. 64 ; 25 & 26 Vict. c. 100 ; 30 & 31 Vict. c. 133 ; 31 & 32 Vict. c. 47 ;

34 & 35 Vict. c. 33 ; 43 & 44 Vict. c. 41 ; 44 & 45 Vict. c. 2 ; 45 & 46 Vict. c. 19 ; 47 & 48 Vict. c. 72 ; 48 & 49 Vict. c. 21 ; 49 & 50 Vict. c. 20.

Cabmen's Shelters.—53 & 54 Vict. c. 59, s. 40.

Canal Boats, used as Dwellings.—40 & 41 Vict. c. 60 ; 47 & 48 Vict. c. 75.

Canals (Dangerous Banks).—61 & 62 Vict. c. 16.

Cattle (Contagious Disorders among).—41 & 42 Vict. c. 74 ; 47 & 48 Vict. cc. 13, 47 ; 49 & 50 Vict. c. 32 ; 53 & 54 Vict. c. 14 ; 55 & 56 Vict. c. 47 ; 56 & 57 Vict. c. 43 ; 57 & 58 Vict. c. 57 ; 59 & 60 Vict. c. 15.

Chaff-Cutting Machinery.—60 & 61 Vict. c. 60.

Chimney Sweepers.—38 & 39 Vict. c. 70 ; 57 & 58 Vict. c. 51.

Commons.—61 & 62 Vict. c. 43.

Contagious Diseases (Notification of).—52 & 53 Vict. c. 72 ; (*Prevention of*),—53 & 54 Vict. c. 34, and (*Isolation Hospitals*).—56 & 57 Vict. c. 68.

Contagious (Venereal) Diseases, at certain Naval and Military Stations.—29 & 30 Vict. c. 35 ; 31 & 32 Vict. c. 80 ; 32 & 33 Vict. c. 96 ; all which three Acts have, however, been now repealed by the 49 Vict. c. 10.

Dairies.—53 & 54 Vict. c. 34, s. 4.

Dancing and Music.—53 & 54 Vict. c. 59, s. 51.

Electric Lighting.—45 & 46 Vict. c. 56; 51 & 52 Vict. c. 12.

Epidemics.—46 & 47 Vict. c. 59; and 52 & 53 Vict. c. 64.

Explosives.—46 & 47 Vict. c. 3.

Factories, &c.—41 & 42 Vict. c. 16; 46 & 47 Vict. c. 53; 54 & 55 Vict. c. 75; 58 & 59 Vict. c. 37; and (as to *Cotton Factories*) 52 & 53 Vict. c. 62; 60 & 61 Vict. c. 58; and (as to London) 54 & 55 Vict. c. 76.

Fruit Pickers' Lodgings.—45 & 46 Vict. c. 23.

Gas.—10 Vict. c. 15; 22 & 23 Vict. c. 66; 23 & 24 Vict. c. 146; 33 & 34 Vict. c. 70; 34 & 35 Vict. c. 41; 36 & 37 Vict. c. 89.

Gymnasiums.—54 & 55 Vict. c. 22.

Hackney Carriages (and Omnibuses).—10 & 11 Vict. c. 89; 52 & 53 Vict. c. 14.

Horseflesh (Sale of).—52 & 53 Vict. c. 11.

Inebriates.—42 & 43 Vict. c. 19; 51 & 52 Vict. c. 19; 61 & 62 Vict. c. 60.

Libraries.—18 & 19 Vict. c. 70; 29 & 30 Vict. c. 114; 34 & 35 Vict. c. 71; 40 & 41 Vict. c. 74; 47 & 48 Vict. c. 37; 50 & 51 Vict. c. 22; 52 & 53 Vict. c. 9; 53 & 54 Vict. c. 68; 55 & 56 Vict. c. 53; 56 & 57 Vict. c. 11.

Lodging Houses, &c., for Artizans and Labourers.—14 & 15 Vict. cc. 28, 34; 16 & 17 Vict. c. 41;

18 & 19 Vict. c. 121, s. 43; 31 & 32 Vict. c. 130; 38 & 39 Vict. c. 36; 42 & 43 Vict. cc. 63, 64; and *for Seamen*—57 & 58 Vict. c. 60, ss. 214—217.

Margarine, &c.—50 & 51 Vict. c. 29.

Mines.—35 & 36 Vict. c. 77; 45 & 46 Vict. c. 3; and 50 & 51 Vict. c. 58 (the last-mentioned Act repealing the former *Mines Acts* of 35 & 36 Vict. c. 76; 44 & 45 Vict. c. 26; and 49 & 50 Vict. c. 40); see also 57 & 58 Vict. c. 52; 59 & 60 Vict. c. 43.

Museums.—54 & 55 Vict. c. 22.

National Portrait Gallery.—52 & 53 Vict. c. 25.

Public Walks, Open Spaces, &c.—23 & 24 Vict. c. 30; 50 & 51 Vict. c. 32; 51 & 52 Vict. c. 40; 52 & 53 Vict. c. 71.

Quarries.—50 & 51 Vict. c. 19; 57 & 58 Vict. c. 42.

Rivers (Pollution of).—39 & 40 Vict. c. 75; 56 & 57 Vict. c. 31; 61 & 62 Vict. c. 34.

Seamen.—57 & 58 Vict. c. 60.

Sewers.—23 Hen. 8, c. 5; 3 & 4 Edw. 6, c. 8; 13 Eliz. c. 9; 3 & 4 Will. 4, c. 22; 4 & 5 Vict. c. 45; 12 & 13 Vict. c. 50; 24 & 25 Vict. c. 133; 38 & 39 Vict. c. 55; 46 & 47 Vict. c. 37.

Shop Hours.—49 & 50 Vict. c. 55; 55 & 56 Vict. c. 62; 56 & 57 Vict. c. 67; 58 & 59 Vict. c. 5; and (as to railways) 56 & 57 Vict. c. 29.

Streets.—55 & 56 Vict. c. 37.

Threshing Machines.—41 & 42 Vict. c. 12; 57 & 58 Vict. c. 37.

Unsound Fish.—38 & 39 Vict. c. 55.

Verminous Persons.—60 & 61 Vict. c. 31.

Water Supply.—10 Vict. c. 17; 26 & 27 Vict. c. 93; 33 & 34 Vict. c. 70; 41 & 42 Vict. c. 25; 60 & 61 Vict. c. 44.

Workmen's Trains.—46 & 47 Vict. c. 34.

Workshops.—30 & 31 Vict. c. 146; 33 & 34 Vict. c. 19; 34 & 35 Vict. c. 104; 54 & 55 Vict. c. 75; and (as to London) 54 & 55 Vict. c. 76.

There are also the following further Acts, exclusively relating to the *Metropolis*:—

Local Management.—18 & 19 Vict. c. 120; 19 & 20 Vict. c. 112; 21 & 22 Vict. c. 104; 25 & 26 Vict. c. 102; 32 & 33 Vict. c. 102; 38 & 39 Vict. c. 33; 41 & 42 Vict. cc. 32, 37; 42 & 43 Vict. cc. 68, 69; 53 & 54 Vict. c. 66; 56 & 57 Vict. c. 55.

Buildings.—18 & 19 Vict. c. 122; 23 & 24 Vict. c. 52; 24 & 25 Vict. c. 87; 32 & 33 Vict. c. 82; 34 & 35 Vict. c. 39; 45 & 46 Vict. c. 14; 48 & 49 Vict. c. 33; 51 & 52 Vict. c. 52; 57 & 58 Vict. c. cexiii.

Burials.—15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134; 20 & 21 Vict. cc. 35, 81.

Canals (Dangerous Places).—61 & 62 Vict. c. 16.

Coal Duties (Abolition of).—52 & 53 Vict. c. 17.

Coal (Sale of).—52 & 53 Vict. c. 21.

Dancing and Music.—57 & 58 Vict. c. 15.

Diseases Prevention.—46 & 47 Vict. c. 35.

Equalization of Rates.—57 & 58 Vict. c. 53.

Gas.—23 & 24 Vict. c. 125; 34 & 35 Vict. c. 41.

Open Spaces.—40 & 41 Vict. c. 35; 44 & 45 Vict. c. 34; 45 & 46 Vict. c. 33; 50 & 51 Vict. cc. 17, 34; 51 & 52 Vict. c. 40.

Regulation of Traffic.—30 & 31 Vict. c. 134; 31 & 32 Vict. c. 5; 48 Vict. c. 18; 53 & 54 Vict. c. 66; also (Michael Angelo's Act) 57 Geo. 3, c. xxix.

Relief of Poor.—27 & 28 Vict. c. 116; 28 & 29 Vict. c. 34; 30 & 31 Vict. c. 6; 32 & 33 Vict. c. 63.

Sewers.—18 & 19 Vict. c. 120; 21 & 22 Vict. c. 104; 25 & 26 Vict. c. 102; 53 & 54 Vict. c. 66.

Slaughter Houses.—37 & 38 Vict. c. 67.

Smoke Furnaces.—16 & 17 Vict. c. 128; 18 & 19 Vict. c. 121, s. 43; 19 & 20 Vict. c. 107.

Streets.—57 & 58 Vict. c. cexiii.

Thames Preservation.—48 & 49 Vict. c. 76.

Unsound Fish.—26 & 27 Vict. c. 117; 37 & 38 Vict. c. 89.

Water.—15 & 16 Vict. c. 84; 34 & 35 Vict. c. 113; 50 & 51 Vict. c. 21; 60 & 61 Vict. c. 56.

CHAPTER X.

OF THE LAWS RELATING TO PUBLIC CONVEYANCES.

IT has been the policy of the legislature of this country to exercise, over the matter of public conveyances, merely a general supervision, trusting to the enterprise of individuals for providing for the welfare of the public in this particular ; and this subject will be considered under three heads, viz. (I.) Stage Coaches, or Hackney Carriages ; (II.) Railways ; and (III.) Conveyances by Water.

I. STAGE COACHES, OR HACKNEY CARRIAGES.—The Acts bearing on these, so far as regards the metropolis, will be found enumerated in the note below (*a*) ; and so far as regards the other parts of England, they are the 2 & 3 Will. IV. c. 120 ; 3 & 4 Will. IV. c. 48 ; and 5 & 6 Vict. c. 79 ; by the first of which Acts, a “stage carriage” is defined to be every carriage, (whatever be its form or construction,) which is drawn by animal power (*b*) ; and used for the purpose of conveying passengers for hire, to and from any place in Great Britain ; and travelling at the rate of three miles or more in the hour ; and for which separate fares shall be charged to separate passengers (*c*). And the Acts provide, that no carriage shall be kept for

(*a*) 1 & 2 Will. 4, c. 22 ; 6 & 7 Vict. c. 86 ; 13 & 14 Vict. c. 7 ; 16 & 17 Vict. cc. 33, 127 ; 30 & 31 Vict. c. 134 ; 31 & 32 Vict. c. 5 ; 32 & 33 Vict. c. 115 ; 54 & 55 Vict. c. 76 ; 59 & 60 Vict. c. 27.

28 & 29 Vict. c. 83 ; 41 & 42 Vict. c. 77, Pt. II. ; 42 & 43 Vict. c. 67 ; 59 & 60 Vict. c. 36 ; and 61 & 62 Vict. c. 29 ; and (regarding *tramway cars*) 33 & 34 Vict. c. 78 ; 42 & 43 Vict. c. xciii.

(*b*) See (regarding *steam carriages* or *locomotives*) 24 & 25 Vict. c. 70 ;

(*c*) 2 & 3 Will. 4, c. 120, s. 5.

this purpose, unless the person who keeps it has a licence from the Board of Inland Revenue ; which must be yearly renewed, and in respect of which certain duties are made payable (*d*) ; nor unless there be on the carriage such numbered plates and particulars as are directed by the Acts ; and these particulars specify the christian and surname of the proprietor, or of one of the proprietors ; the extreme places to which the licence extends ; and the greatest number of inside and outside passengers which the carriage may lawfully convey (*e*) ; and *mail* coaches, in particular, are the subject of further special regulations (*f*). The Acts also impose penalties on those in charge of these carriages, for offences or acts of negligence which militate against the safety or convenience of the public, —*e.g.*, driving a stage coach without a licence, or with a defective licence, or without having such plates and particulars as above referred to (*g*) ; carrying too many passengers, or too much luggage (*h*) ; intoxication, negligence, or furious driving (*i*) ; and in short, any misconduct, either in the driver or in the conductor, which shall endanger the safety or the property of any person, or even seriously inconvenience him (*k*) ; and furious driving or racing (whether by a stage carriage or by any other carriage), if attended with any personal injury, is a misdemeanor even by the common law (*l*). And the Acts further provide, that where the driver, conductor, or guard of a stage carriage, who has committed the offence, is not

(*d*) 2 & 3 Will. 4, c. 120, s. 6 ;
10 & 11 Vict. c. 42, s. 2 ; and
32 & 33 Vict. c. 14, s. 7.

(*e*) 2 & 3 Will. 4, c. 120, s. 36 ;
5 & 6 Vict. c. 79, ss. 11, 13, 14.

(*f*) 2 & 3 Will. 4, c. 120, s. 46 ;
5 & 6 Vict. c. 79, s. 12.

(*g*) 2 & 3 Will. 4, c. 120, ss. 30—
36 ; 5 & 6 Vict. c. 79, s. 14.

(*h*) 3 & 4 Will. 4, c. 48, ss. 2, 3,
4 ; 5 & 6 Vict. c. 79, s. 15.

(*i*) 2 & 3 Will. 4, c. 120, s. 48.

(*k*) *Ex parte Kippens*, [1897]
1 Q. B. 1.

(*l*) 24 & 25 Vict. c. 100, s. 35 ;
and see 41 & 42 Vict. c. 77 ; and
(as to *bicycles*, &c.) 51 & 52 Vict.
c. 41, s. 85 ; and (as to *omnibuses*)
52 & 53 Vict. c. 14.

known, or cannot be found, the *proprietor* shall be liable to the penalty (*m*),—unless he prove (by evidence other than his own testimony), that the offence was committed without his privity or knowledge, and without any benefit therefrom to himself, and that he has used his best endeavours to find out the offending driver, conductor, or guard (*n*). And a “*light locomotive*” within the meaning of the 59 & 60 Vict. c. 36, is a carriage within all these provisions ; but the “*licensed locomotives*” and “*registered locomotives*” which are provided for by the 61 & 62 Vict. c. 29, are regulated by the specific provisions contained in that Act.

II. RAILWAYS.—These are usually constructed (and to some extent regulated) under the provisions of special Acts from time to time passed for the purpose ; and in which special Acts are usually incorporated the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and (in the case of special Acts passed after July, 1863), the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92). But there exist also the following statutes affecting railways in general: 1 & 2 Vict. c. 98; 3 & 4 Vict. c. 97; 5 & 6 Vict. c. 55 ; 7 & 8 Vict. c. 85 ; 8 & 9 Vict. c. 96 ; 9 & 10 Vict. c. 57; 12 & 13 Vict. c. xl.; 13 & 14 Vict. c. xxxiii.; 13 & 14 Vict. c. 83 ; 14 & 15 Vict. c. 64; 15 & 16 Vict. cap. c.; 17 & 18 Vict. c. 31 ; 22 & 23 Vict. c. 59 ; 24 & 25 Vict. c. 97, ss. 35—38 ; c. 100, ss. 32, 34 ; 29 & 30 Vict. c. 108; 30 & 31 Vict. c. 127; 31 & 32 Vict. c. 119; 32 & 33 Vict. c. 114 ; 33 & 34 Vict. c. 19 ; 34 & 35 Vict. c. 78 ; 35 & 36 Vict. c. 50 ; 36 & 37 Vict. cc. 48, 76 ; 38 & 39 Vict. c. 31 ; 41 & 42 Vict. c. 20 ; 42 & 43 Vict. c. 56 ; 46 & 47 Vict. c. 34 ; 51 & 52 Vict. c. 25 ; 52 & 53 Vict. c. 57 ; 55 & 56 Vict. c. 44 ; and 57 & 58 Vict. c. 54 (*o*).

(*m*) 2 & 3 Will. 4, c. 120, s. 49 ;
6 & 7 Vict. c. 86, s. 35 ; 12 &
13 Vict. c. 92, s. 22.

(*n*) 2 & 3 Will. 4, c. 120, s. 49.

(*o*) See also (as to *light railways*)
59 & 60 Vict. c. 48 ; and the Rules
of August, 1898, made under that
Act.

Under these statutes, the general supervision and regulation of all railways is entrusted to the Board of Trade ; but by the 36 & 37 Vict. c. 48, s. 10, certain of the powers and duties of the Board of Trade in relation to railways were transferred to the Railway Commissioners appointed under that Act ; and this transfer is continued under the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25). Under the provisions of the specified Railway Acts, it is made unlawful to open any railway, or portion of a railway, for the public conveyance of passengers, until one month's notice in writing shall have been given to the Board of Trade of the intention of the company to open the same for traffic ; and ten days' notice of the time when the railway will be complete and ready for their inspection must also be given to the Board (*p*) ; and the Board may postpone the opening of any railway, until satisfied that the public may use the same without danger. And in execution of its general control of railways, the Board orders every railway company to make returns to them of the aggregate traffic in passengers, cattle, and goods ; of the occurrence of any serious railway accidents ; and of all tolls and rates from time to time levied (*q*) ; and the Board appoints proper persons as inspectors of railways (*r*). Moreover, every railway company (whether specially called upon to do so or not) must report to the Board of Trade every accident attended with serious personal injury, within forty-eight hours of its occurrence (*s*) ; and is required to lay before the Board, for its approbation, certified copies of the bye-laws and regulations by which it is governed (*t*),—which bye-laws may be either sanctioned or disallowed by the Board at its pleasure ; and the Board may direct the attorney-general to proceed against any

(*p*) 5 & 6 Vict. c. 55, ss. 4, 5.

(*q*) 3 & 4 Vict. c. 97, s. 3 ; 5 & 6 Vict. c. 55, s. 8.

(*r*) 3 & 4 Vict. c. 97, s. 5 ; 7 & 8 Vict. c. 85, s. 15.

(*s*) 5 & 6 Vict. c. 55, s. 7.

(*t*) 3 & 4 Vict. c. 97, ss. 7, 8.

railway company, for non-compliance with the provisions either of its special Act or of any of the general Acts regulative of railways, or for any unlawful act whatsoever (*u*).

The Railway Acts contain also provisions, regulating the liability of railway companies for neglect or default in the carriage of goods (*x*) ; authorizing the summary apprehension and punishment of engine-drivers, and other servants of the company, guilty of any misconduct (*y*) ; and subjecting to punishment all ill-disposed persons obstructing or injuring any railway engine or carriage, or endangering the safety of the passengers (*z*). And, under the particular provisions of the Acts, railway companies (amongst other obligations) are required to maintain and keep in repair good and sufficient fences along their lines (*a*) ; to transport, at a settled rate, military and police forces (*b*) and mails (*c*) ; to afford all reasonable facilities for the conveyance of traffic, without any undue preference of particular persons or companies, or of particular descriptions of traffic (*d*) ; to permit and facilitate the introduction of electric telegraphs upon their lines (*e*) ; to keep accounts of the money received for the conveyance of passengers, or from other sources, upon their respective lines, and to deliver copies of such accounts to the Board of Inland Revenue ; and to pay a monthly duty on their receipts (*f*).

By one of the statutes above mentioned, viz., 7 & 8 Vict. c. 85, it was provided, that if,—at any time after

(*u*) 7 & 8 Vict. c. 85, ss. 16—18.

(*x*) 8 & 9 Vict. c. 20, s. 89 ; 14 & 15 Vict. c. 19, ss. 6, 8, 10 ; 17 & 18 Vict. c. 31, s. 7 ; 31 & 32 Vict. c. 129, ss. 14—21.

(*y*) 3 & 4 Vict. c. 97, ss. 13, 14 ; 5 & 6 Vict. c. 55, ss. 17, 18.

(*z*) 24 & 25 Vict. c. 97, ss. 35—38 ; c. 100, ss. 32—34.

(*a*) 5 & 6 Vict. c. 55, s. 10.

(*b*) Sect. 20 ; 7 & 8 Vict. c. 85, s. 12 ; 46 & 47 Vict. c. 34, s. 6.

(*c*) 1 & 2 Vict. c. 98 ; 7 & 8 Vict. c. 85, s. 11.

(*d*) 17 & 18 Vict. c. 31, ss. 1—6.

(*e*) 7 & 8 Vict. c. 85, ss. 14, 15.

(*f*) 5 & 6 Vict. c. 79, s. 4 ; 10 & 11 Vict. c. 42.

twenty-one years from the passing of the special Act for any passenger railway established after the year 1844,—the average divisible profits for three successive years, upon the paid-up capital stock of such passenger railway company, should be found to equal or exceed 10*l.* per cent., the Lords of the Treasury should be at liberty, (an Act of Parliament being first obtained for that purpose,) to revise and reduce the fares, upon condition of giving the company a guarantee to make good their profits to the amount of 10*l.* per cent. during the existence of such reduced scale ; or the Treasury might purchase the railway, whatever might be the rate of divisible profits earned thereon (*g*) ; and this right of purchase was subsequently extended to the electric telegraphs (*h*) ; and the Act also required railway companies in general to secure, to the poorer class of travellers, the means of travelling by cheap trains, *i.e.* at moderate fares, and in carriages protected from the weather (*i*).

The Act 7 & 8 Vict. c. 85 also prohibited railway companies from raising loans for the future on negotiable securities, except as authorized by parliamentary enactment (*k*) ; and the 8 & 9 Vict. c. 16, ss. 38—55, as amended by the 28 & 29 Vict. c. 78, and 33 & 34 Vict. c. 20, contains numerous regulations with regard to railway companies borrowing money on bond or mortgage (*l*) ; and provision has been made, by the 30 & 31 Vict. c. 127, with regard to the financial arrangements of insolvent railway companies, as well for the protection of their creditors on the one hand, as also for the protection of

(*g*) 7 & 8 Vict. c. 85, ss. 1—4.

(*h*) 31 & 32 Vict. c. 110.

(*i*) The fare for third-class passengers, by these cheap or government trains, is not to exceed one penny per mile (21 & 22 Vict.

c. 75 ; 23 & 24 Vict. c. 41 ; 46 & 47 Vict. c. 34, s. 3).

(*k*) 7 & 8 Vict. c. 85, s. 19.

(*l*) *Prince v. Great Western Railway Company*, 16 Mee. & W. 244.

their shareholders on the other (*m*); and the Act 31 & 32 Vict. c. 119, which deals with the accounts of railway companies, provides for the protection of the shareholders, by inspection of such accounts, and by a proper system of audits.

The Act 31 & 32 Vict. c. 119 contains also provisions for securing the safety and comfort of the public, and (among others) this important regulation, that in every passenger train which travels more than twenty miles without stopping, there shall be provided such sufficient means of communication, between the passengers and the servants of the company in charge of the train, as the Board of Trade shall approve (*n*).

III. CONVEYANCES BY WATER,—that is to say, the carriage of passengers in merchant ships generally, and being either steamers or sailing vessels, — particular rivers (*e.g.*, the Thames) having their own particular regulations (*o*).

Firstly, as to STEAMERS.—The Merchant Shipping Act, 1894, continuing the like provisions contained in the earlier Acts referred to in the chapter on Navigation (*p*), provides, that every “passenger steamer,”—being any “British “steam-ship carrying passengers to, from, or between any “place or places in the United Kingdom (excepting steam “ferry-boats working on chains, commonly called steam “bridges), or any foreign steam-ship carrying passengers “between places in the United Kingdom” (*q*),—which shall carry a greater number of passengers than twelve, shall be surveyed by, and reported upon to, the Board of

(*m*) *In re Potteries, Shrewsbury, and North Wales Railway Company*, Law Rep., 5 Ch. App. 67.

(*n*) 31 & 32 Vict. c. 119, s. 22.

(*o*) 2 & 3 Philip & Mary, c. 16; 22 & 23 Vict. c. xxxiii.

(*p*) See also the Chinese Passengers Act, 1855, 18 & 19 Vict. c. 104.

(*q*) 57 & 58 Vict. c. 60, s. 267.

Trade at least once in every year (*r*) ; and shall proceed on no voyage with passengers, unless the owner or master has received from the Board a certificate applicable to the voyage, and showing that the provisions of the Act have been complied with (*s*) ; and in case the captain or person in charge receives on board any number of passengers greater than the number allowed by the certificate, the owner or master is made liable to pecuniary penalties. And the master of every such ship carrying passengers between places in the United Kingdom shall, when navigating within the limits of any district for which pilots are licensed, (unless he or his mate has a certificate enabling him to conduct the vessel himself,) employ a qualified pilot ; and, if he fails to do so, he is liable to a penalty not exceeding 100*l.* (*t*). And we have seen, on p. 171, *supra*, that the masters of all foreign-going vessels and of home-trade passenger ships must have either the certificate of competency or of service there mentioned ; and wherever such certificate is necessary, then the vessel or ship, if a steamer, is to have also on board a certificated engineer or engineers.

Secondly as to PASSENGER SHIPS GENERALLY, otherwise called EMIGRANT SHIPS.—The Passengers Acts, 1855, 1863, 1872, and 1876 (being respectively the 18 & 19 Vict. c. 119, 26 & 27 Vict. c. 51, 35 & 36 Vict. c. 73, and 39 & 40 Vict. c. 80), extended to every sea-going vessel, whether British or foreign, which carried more than *fifty* passengers (*u*), from the United Kingdom to any place out of Europe, and not being within the Mediterranean Sea (*x*) ; and the execution of the Acts was committed to “the Board of Trade” (*y*), or (in her Majesty’s possessions abroad) to the officers there specially

(*r*) 57 & 58 Vict. c. 60, s. 271.

(*s*) *Ibid.*

(*t*) *Ibid.*, s. 604 ; *The Hanna*,
Law Rep., 1 Adm. & Ecc. 283.

(*u*) 26 & 27 Vict. c. 51, s. 3 ;
52 & 53 Vict. c. 29.

(*x*) 18 & 19 Vict. c. 119, s. 4.

(*y*) 35 & 36 Vict. c. 73, s. 5.

appointed for the purpose, and (in their absence) to the chief customs officer of the place (*z*). But all the specified Acts (save some few sections of the Act of 1872) have now been repealed, and their provisions re-enacted with amendments, by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). And the last-mentioned Act, after defining an *emigrant ship* as “every sea-going ship, whether British or foreign, and whether or not conveying mails, carrying” (*scil.*, upon foreign voyages) “more than *fifty* steerage passengers” (or more such passengers than according to a certain proportion of the ship’s registered tonnage for each statute adult) (*a*),—provides (in effect) as follows, that is to say :—that no such ship (unless it be a duly certificated passenger *steamer*) shall clear out to sea, until duly surveyed and reported seaworthy (*b*) ; nor until the master shall have obtained, from the proper authority at the port of clearance, a certificate that the requirements of the Act have been duly complied with, and that the ship is seaworthy, in safe trim, and in all respects fit for her voyage, and her passengers and crew in a fit state to proceed (*c*) ; nor until the master shall have joined in a bond to the crown in the sum of 2,000*l.* or (where neither the owners nor the charterers reside in the United Kingdom) in the sum of 5,000*l.*, conditioned, *inter alia*, for the seaworthiness of the vessel (*d*). The Act contains also a great many provisions for limiting the number and ensuring the safety and accommodation, health and welfare, of the passengers (*e*),—and for regulating *colonial* voyages, as defined in the Act (*f*) ; but with regard to vessels plying between ports in Australasia, the governor of the colony from which the vessel proceeds is also authorized to make the proper regulations (*g*). The Act of 1894 further

(*z*) 18 & 19 Vict. c. 119, ss. 8, 9.

(*a*) 57 & 58 Vict. c. 60, s. 268.

(*b*) *Ibid.* s. 289.

(*c*) *Ibid.* s. 314.

(*d*) *Ibid.* s. 309.

(*e*) *Ibid.* ss. 291—308.

(*f*) *Ibid.* s. 366.

(*g*) *Ibid.* s. 367.

provides, that the master of every ship bringing steerage passengers into the United Kingdom, from any place out of Europe, and not within the Mediterranean Sea, shall, twenty-four hours after arrival, deliver to the proper authority a correct list, under his signature, specifying the names, ages, and callings of all the steerage passengers embarked, and the ports from whence they came ; and which of them (if any) have died, (with the supposed cause of death,) or have been born, during the voyage ; and if the master shall fail to deliver such list, or it be wilfully false, he incurs a penalty not exceeding 50*l.* (*h*) ; and if any ship bringing steerage passengers *into* the United Kingdom from any place out of Europe, and not within the Mediterranean Sea, has on board a greater number of steerage passengers than is allowed by the Act for passengers *from* the United Kingdom, the master is liable to a fine not exceeding 10*l.* for every statute adult constituting such excess (*i*).

(*h*) 57 & 58 Vict. c. 60, s. 336.

(*i*) *Ibid.* s. 337.

CHAPTER XI.

OF THE LAWS RELATING TO THE PRESS.

THE law of copyright in books, newspapers, pamphlets, &c., having been already discussed, we are now to consider the law relating to printers and publishers generally, and to the press. For the press is a mighty engine for good or for evil, according as it is used ; and therefore, from its very nature, it requires to be kept under due restraint ; and there existed in this country a censorship of the press from the time of Henry VIII.,—a censorship which was exercised originally in the Court of Star Chamber. And when that court was abolished, in 1641, the like jurisdiction was repeatedly exercised by the Long Parliament, and notably in the years 1643, 1647, 1649, and 1652 (*a*). After the Restoration, in 1660, the censorship was regulated and continued under the 14 Car. II. c. 33 ; which Act expired in the year 1679, but was revived by 1 Jac. II. c. 17, and afterwards continued by 4 Will. & Mary, c. 24, till the year 1694, since which last-mentioned year this censorship has ceased. And although no censorship has since that year been, or is now, exercised in this country over the press, still the press is duly held in check, by certain restrictive provisions, having for their general object to ascertain in every instance the printer and publisher of every book, newspaper, &c.,—so as to make these gentlemen amenable to the law wherever the purposes of civil redress or of criminal justice require (*b*).

(*a*) Scobell, i. 44, 134 ; ii. 88, 230.

(*b*) *The Queen v. Hicklin*, Law Rep., 3 Q. B. 360.

The restrictive provisions referred to are principally those contained in the 2nd schedule to the Act 32 & 33 Vict. c. 24 ; which Act repealed a great number of prior Acts, and parts of prior Acts, which were deemed to be hostile to the legitimate freedom of printing (*c*), and re-enacted those portions of such prior Acts which appeared, or were deemed, to impose only reasonable restrictions on the liberty of printing and of the press. The Principal Act, 32 & 33 Vict. c. 24, has been itself also amended successively by the 44 & 45 Vict. c. 60, and by the 51 & 52 Vict. c. 64 ; and the provisions of these three Acts may (as to their general effect) be stated as follows, that is to say :— That every person who shall print any paper for hire or gain shall carefully preserve and keep one copy (at least) of such paper ; and shall write or print thereon, in fair and legible characters, the name and place of abode of his employer ; and for neglecting to do so, or if he fail to produce the copy to any justice who, within the space of six calendar months, shall demand a sight thereof, he is to incur a penalty, for every such neglect or omission, of 20*l*. And, further, every person who prints any paper or book whatsoever, for publication or dispersion, must print upon the front thereof (if the same be printed upon one side only), or upon the first or last leaf of every paper or book consisting of more than one leaf, in legible characters, his name and usual place of abode or business ; and for neglecting to do so, he and every person publishing or dispersing, or assisting in publishing or dispersing, any paper or book printed without such particulars, forfeits, for every copy so printed, a sum not exceeding 5*l*. But in the case of books or papers printed at the University Press of Oxford, or at the Pitt Press of Cambridge, the printer, instead of printing his name thereon, is merely to print the following words, “Printed at the University Press,

(*c*) 39 Geo. 3, c. 79 ; 51 Geo. 3, c. 65 ; 6 & 7 Will. 4, c. 76 ; 2 & 3 Vict. c. 12 ; and 9 & 10 Vict. c. 33.

Oxford,” or (as the case may be) “Printed at the Pitt Press, Cambridge” (*d*). Also, the above provision with respect to the printer’s name and place of abode does not extend to any papers printed by the authority, and for the use, of either House of Parliament (*e*); or to any bank note or security for payment of money; or to any bill of lading, policy of insurance, letter of attorney, deed or agreement, transfer or assignment of public stock or securities, or dividend warrant thereon; or to any receipt for money or goods; or to any proceedings in any court of law or equity. And as regards the penalties imposed by the 32 & 33 Vict. c. 24, no person is to be sued but within three months after the offence; and the action is to be brought in the name of the attorney-general or solicitor-general.

The Act 44 & 45 Vict. c. 60, also provides (by section 8) for a register of the proprietors of newspapers, to be kept by the registrar of joint stock companies; and (by section 7) for the registration in such register of one or more responsible “*representative* proprietors,” where the proprietary is numerous; and (by section 9) it is made the duty of all printers and publishers of newspapers, to make returns to the registrar of various particulars,—including the title of the newspaper, and the names and occupations and places of business and of residence of all the proprietors; and for neglect to make such returns, the printer or publisher offending is (by section 10) made liable to a penalty not exceeding 25*l.*; and he may be summarily ordered to make the necessary returns; and the penalty is recoverable (by section 16) before any court of summary jurisdiction, in accordance with the Summary Jurisdiction Acts. But by way of affording to honest printers and publishers, who are reasonably careful of

(*d*) *Bensley v. Bignold*, 5 B. & A. 335; *Merchant v. Evans*, 2 Moore, 14.

(*e*) 32 & 33 Vict. c. 24, Sched. II., re-enacting 39 Geo. 3, c. 79, s. 28; and 51 Geo. 3, c. 65, s. 3.

what they permit to appear in the newspapers printed or published by them, it was provided, by the 44 & 45 Vict. c. 50, that newspaper reports of certain meetings should be privileged (section 2); and that no prosecution for a libel contained therein should be commenced without the fiat of the director of criminal prosecutions (section 3),—both which provisions have now been repealed by the 51 & 52 Vict. c. 64; and the 51 & 52 Vict. c. 64, has now enacted more liberally as follows, that is to say:—That a fair and accurate report of any proceedings (not including any blasphemous or indecent part thereof) in courts of justice (section 3) (*f*),—or a fair and accurate report of any public (and certain other) meetings, not including any blasphemous or indecent matter (section 4),—shall be privileged; and that no prosecution for any newspaper libel shall be commenced, without the order of a judge at chambers first had and obtained for the purpose, on due notice to the proposed defendant (section 8). And the Act contains also provisions (in relief of printers and publishers) against vexatious actions and unrighteous damages (sections 5, 6), besides provisions (in favour of public chastity and purity) against the disclosure of any obscene matter contained in any alleged libellous book, newspaper, pamphlet, &c. (section 7).

(*f*) *Kimber v. Press Association*, [1893] 1 Q. B. 65.

CHAPTER XII.

OF THE LAWS RELATING TO HOUSES OF PUBLIC RECEPTION
AND ENTERTAINMENT.

THE matters which next demand our consideration are the laws which relate to Public Houses and to Theatres.

1. PUBLIC HOUSES.—The enactments relating to public houses are of two kinds,—the first having in view the subject of *revenue* ; and the others having in view the proper *police* regulation of these places, and the prevention of the abuses to which they are peculiarly subject. And as we have in a previous volume already sufficiently discussed such of these enactments as relate to the Revenue or Excise, we will here only mention, that (by one of these enactments) any person selling wine, spirits, beer, cider, or perry, by retail, who shall carry on such trade without an *excise licence*, forfeits for every such offence the sum of 50*l.* (a) ; and we pass on therefore, at once, to consider the enactments which relate to (and provide for) the police regulation of public houses.

Now these last-mentioned enactments commence as early as the reign of Edward the Sixth (b) : but the chief of them, which are now in force, are the 9 Geo. IV. c. 61 (“The Alehouse Act, 1828”), 32 & 33 Vict. c. 27 (“The Wine and Beerhouse Act, 1869”), 33 & 34 Vict. c. 29 (“The Wine and Beerhouse Act Amendment Act, 1870”), and 35 & 36 Vict. c. 94 (“The Licensing Act, 1872”),

(a) 6 Geo. 4, c. 81, s. 26 ; 7 & c. 27 ; and 24 & 25 Vict.
8 Geo. 4, c. 53 ; 4 & 5 Vict. c. 20 ; c. 91.
18 & 19 Vict. c. 38 ; 23 & 24 Vict. (b) 5 & 6 Edw. 6, c. 25.

as amended by the 37 & 38 Vict. c. 49, 43 & 44 Vict. cc. 6, 20, 45 & 46 Vict. c. 34, 47 & 48 Vict. c. 29, and 49 & 50 Vict. c. 56 (*c*).

Under these Acts, every keeper of an inn, alehouse, or victualling house, wherein is sold wine, spirits, beer, cider, perry, or other exciseable liquors, by retail, to be consumed either *on* or *off* the premises, must, in addition to his excise licence (*d*), obtain a licence from the justices having jurisdiction in the place where the house is situate (*e*); and such licence is applied for at the “general annual licensing meeting” held in pursuance of the above statutes; and it was (and is) only refused, in general, for some reasonable

(*c*) The 25 Geo. 2, c. 36 (as amended by the 38 & 39 Vict. c. 21), required every house, room, garden, or other place, kept in *London* or *Westminster*, or within a circuit of twenty miles, for public dancing, music, or other public entertainment of the like kind, “to be licensed by the magistrates at quarter sessions (and under the 51 & 52 Vict. c. 41, s. 3, by the London County Council), under the penalty of being deemed (and punishable as) a disorderly house”; and over the doors of such places, there must have been affixed and kept the words “Licensed pursuant to Act of Parliament of the twenty-fifth of King George the Second”; and such houses and places were not (as a general rule) allowed to be opened for the purpose of public entertainment before the hour of noon; but the law upon this subject is now contained in the Music and Dancing Licenses (Middlesex) Act, 1894 (57 & 58 Vict. c. 15), which came into operation on the 1st January,

1895: and the new Act extends to the whole administrative county of Middlesex, and consolidates the previous Acts, the new superscription to be affixed over the doors of the licensed premises being “Licensed in pursuance of Act of Parliament for” (*dancing*, or whatever else the licence is for). And see 9 Geo. 4, c. 47 (as to packet boats); 5 & 6 Will. 4, c. 39 (as to theatres); 23 & 24 Vict. c. 27 (as to refreshment houses); and 51 & 52 Vict. c. 41, s. 3 (as to race-courses).

(*d*) *R. v. Drake*, 6 Mau. & Sel. 116; *R. v. Downs*, 3 T. R. 560.

(*e*) Prior to the “Licensing Acts” above mentioned, the law as to the sale of “beer, cider, and perry,” for consumption *off* the premises, was regulated by the 11 Geo. 4 & 1 Will. 4, c. 64; 4 & 5 Will. 4, c. 85; and 3 & 4 Vict. c. 61 (a group of statutes commonly known as the “Beer Acts”); and under these, no licence from the justices was required, but an excise licence only.

objection on the ground of character or otherwise (*f*); but as regards licences for the sale of beer, by retail, for consumption *off the premises*, the licensing justices always had an absolute discretion (*g*); and apparently the grant or renewal of the licence, whether for consumption on or off the premises, is in all cases now to be considered as lying in the absolute discretion of the justices (*h*).

These licences to sell exciseable liquors are granted by the magistrates subject to certain conditions, which have for their object the preservation of sobriety and decorum on the licensed premises; and, still further to promote that object, and with a view also to discouraging unnecessary indulgence in drink generally, it was enacted, by "The Tipling Act" (*i*), that no action should be maintained for a debt for spirituous liquors (*scilicet*, consumed on the licensed premises), unless *bonâ fide* contracted at one time to the amount of twenty shillings and upwards; and by 51 & 52 Vict. c. 43, s. 182, that no action should be maintained for any debt for ale, porter, beer, cider, or perry consumed on the premises where the same was sold or supplied. And with the same objects in view, and by means of the Licensing Acts, the law has subjected public houses and all other places in which any species of intoxicating liquors are sold by retail, whether intended to be consumed *on or off the premises*, to an efficient system of inspection and restraint; and we will now proceed to give some account of these last-mentioned Acts.

The Licensing Acts, 1872 and 1874 (*j*), enact, in the first place, that if any person shall sell or expose for sale any intoxicating liquor without having a licence to sell,—

(*f*) *The Queen v. West Riding*, Q. B. D. 239; *The Queen v. Scott*, Law Rep., 5 Q. B. 33; *The Queen v. Pilgrim*, *ib.*, 6 Q. B. 89; *The Queen v. Sykes*, 1 Q. B. D. 52.

(*g*) 45 & 46 Vict. c. 34.

(*h*) *Sharpe v. Wakefield*, 22

Q. B. D. 481; *Stevens v. Green*, 23 Q. B. D. 143.

(*i*) 24 Geo. 2, c. 40.

(*j*) 35 & 36 Vict. c. 94; 37 & 38 Vict. c. 49.

or at a place where, by his licence, he is not authorized to sell,—he shall be liable, in the case of a first offence, to a penalty not exceeding 50*l.*, or to imprisonment with or without hard labour for not more than one month ; and in the case of a second or other subsequent offence, the penalty may be as much as 100*l.*, and the imprisonment rises to three months, and to six months ; and on a third conviction, the offender is disqualified from holding a licence (*k*). Also, if any licensed person permits drunkenness, or any violent quarrelsome or riotous conduct, on his premises ; or sells liquor to a drunken person (*l*), or spirits to be drunk on the premises to a child apparently under the age of sixteen ; or permits his premises to be used as a brothel ; or harbours on his premises a constable on duty ; or bribes or attempts to bribe any constable ; or suffers gaming or unlawful games to be carried on on his premises—for every such offence—and for some other cognate specified offences against public order—he is liable to a pecuniary penalty ; and he is liable also to have the conviction entered, *i.e. recorded on his licence* ; and such entry, in the case of two convictions, will cause a forfeiture of his licence ; and will disqualify him (if convicted a third time) from afterwards obtaining a fresh licence for the term of five years ; and will in some cases prevent even a grant being made to any one, in respect of the same premises, for the space of two years from the date of such third conviction (*m*).

And secondly, the Acts contain stringent regulations, with regard to the *times* during which the sale of intoxicating liquors may be carried on, it being provided, that all premises wherein such liquors are sold by retail, if situate *within the metropolitan district*, (that is to say, in the city of

(*k*) 35 & 36 Vict. c. 94, ss. 3, 4 ;
Re Brown, 3 Q. B. D. 545.

(*m*) See Sects. 7, 13, 15, 16, 17,
 30, 31 ; *Bew v. Harston*, 3 Q. B. D.

(*l*) *Commissioners of Police v.* 454.
Cartman, [1896] 1 Q. B. 655.

London or the liberties thereof, or any place subject to the jurisdiction of the late Metropolitan Board of Works (now London County Council), or within the four-mile radius from Charing Cross,) must be closed on week days (except Saturdays) from half an hour after midnight until five o'clock on the same morning ; and if situated beyond such metropolitan district, but in the metropolitan *police* district, (or in a town or place with a population of not less than one thousand, determined to be a "populous place" by the county licensing committee,) must be closed between the hours of eleven at night and six on the following morning ; and if situated elsewhere, between the hours of ten at night and six on the following morning (*n*). And with regard to Saturday nights and Sundays (including Christmas Day and Good Friday) (*o*), the hours of closing *in the metropolitan district* are on *Saturday night* from midnight until one o'clock in the afternoon of the following Sunday, and on *Sunday night* from eleven o'clock till five on the following morning ; in places *beyond* that district, and in the metropolitan police district, or in a "populous place," on Saturday night from eleven o'clock until 12.30 p.m. usually, but sometimes 1 p.m., on the following Sunday, and on Sunday night from ten o'clock until six on the following morning ; and if elsewhere, then on Saturday night from ten o'clock until 12.30 p.m. usually, but sometimes 1 p.m., on the following Sunday, and on Sunday night from ten o'clock until six o'clock on the following morning ; and all premises, wherever situate, must be closed on Sunday afternoon, from half-past two till six o'clock (*p*). And any person who sells or exposes for sale, or keeps open any premises for the sale of, intoxicating liquors, during

(*n*) 37 & 38 Vict. c. 49, ss. 3, 6.

(*o*) Christmas Day and Good Friday are treated as Sundays.

(*p*) By the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), the premises must be closed the whole of Sunday.

the times that such premises should be closed, or who allows during such times intoxicating liquors to be consumed thereon, is rendered liable to a penalty, of 10*l.* for the first and of 20*l.* for any subsequent offence,—excepting in the case of *bonâ fide* travellers, or of persons lodging in his house, or (in the case of a railway station) of persons arriving at or departing from such station by the rail (*q*).

The Licensing Acts supply also additional safeguards, with regard to the manner in which licences are granted ; and for this purpose, the justices in quarter sessions for every county are directed annually to appoint among themselves a *licensing committee*, consisting of not less than three nor more than twelve members (*r*), by whom the grant of all new licences, made at the general annual licensing meeting, must be confirmed (*s*) ; and analogous provisions are made with regard to borough justices,—except that, where there are less than ten acting justices in the borough, the licensing committee is to be a “joint committee,” that is to say, is to consist of three of the borough magistrates and three of the magistrates for the county in which the borough is situate (*t*).

In addition to public houses properly so called, the legislature, in the year 1860, sanctioned a distinct class of houses for the refreshment of the public, called “refreshment houses,”—such houses having been for the first time sanctioned by the 23 & 24 Vict. c. 27 (amended by the

(*q*) 37 & 38 Vict. c. 49, ss. 9, 10 ; *Taylor v. Humphries*, 10 C. B. (N.S.) 429 ; *Coulbert v. Troke*, 1 Q. B. D. 1.

(*r*) The local authority of any licensing district may, on proper cause shown, exempt any licensed person in the immediate neighbourhood of a market, or place where some lawful trade or calling is carried on, from the closing

provisions of the Act, save only between the hours of one and two o'clock in the morning (35 & 36 Vict. c. 94, s. 26); and a licensed person may also obtain, from the local authority, an exemption in respect of *special occasions* to be specified in his license (35 & 36 Vict. c. 94, s. 29).

(*s*) Sect. 37.

(*t*) Sect. 38.

24 & 25 Vict. c. 91, ss. 8—11) ; and under that Act (as amended), in order to keep a refreshment house, it is necessary to obtain, from the officers of Inland Revenue, an excise licence bearing an excise duty (*u*) ; and any person licensed to keep a refreshment house, who pursues therein the business of a confectioner, or who keeps open such house for the purpose of selling (to be consumed therein) animal or other victuals, wherewith wine or other fermented liquors are usually drunk, is entitled (subject to the terms of the Act) to take out an excise licence to sell wine by retail in such house, to be consumed on the premises (*x*),—the excise licence in the case of refreshment houses being now only granted (by force of the 32 & 33 Vict. c. 27) on a certificate from the justices, as in other cases of licensed houses. And according to the requirements of the Licensing Act, 1872, no intoxicating liquor may be consumed upon premises licensed as a refreshment house, but not for the sale of any intoxicating liquor, during the hours during which licensed victuallers must keep their houses closed ; and the same Act has enacted, as regards refreshment houses *not* licensed for the sale of intoxicating liquors, that the hours during which they may be kept open shall be the same as in the case of licensed victualling and other public houses.

The 23 & 24 Vict. c. 27 also further provided (without reference to refreshment houses), that any person, keeping a shop for the sale of goods and commodities, should be entitled to take out another sort of excise licence, commonly called a “*grocer’s licence*,” to sell therein wine by retail,—in reputed quart or pint bottles only, and not to be consumed in the shop (*y*), but this excise licence also is now only granted on a certificate from the justices (*z*).

(*u*) 23 & 24 Vict. c. 27, ss. 1, 2,
Sched. No. 1.

(*y*) 23 & 24 Vict. c. 27, s. 1,
Sched. No. 3.

(*x*) 35 & 36 Vict. c. 94, s. 27.

(*z*) 32 & 33 Vict. c. 27, s. 4.

2. THEATRES.—The 6 & 7 Vict. c. 68, intituled “An Act for regulating Theatres,” first repeals the then existing enactments (*a*) as to theatres, and then proceeds to prohibit (under penalties) all persons from having or keeping (*b*) any house or other place of public resort in Great Britain, for the public performance of stageplays (*c*),—unless they shall have either the authority of letters-patent from the crown, or a licence from the lord chamberlain of the household; or else a licence from at least four justices assembled at a special sessions holden for the division wherein the theatre is situate (*d*). And the Act defines the jurisdiction of the lord chamberlain as extending to all theatres, (not being patent theatres,) within the parliamentary boundaries of London and Westminster, and within the boroughs of Finsbury and Marylebone, the Tower Hamlets, Lambeth, and Southwark, and also within all places where the sovereign shall occasionally reside; and defines the jurisdiction of the justices as extending, generally, to all places beyond these limits (*e*). But no licence is to be granted, by either of these authorities, except to the actual and responsible manager of the proposed theatre for the time being; and he is to give security for the due observance of such regulations as the authorities may impose: and no licence from the justices is in force at the Universities of Oxford or Cambridge, or within fourteen miles of the same, without the consent of the chancellor or vice-chancellor of these universities (*f*). And penalties are imposed on any person who, for hire, acts, or causes to be acted, any part

(*a*) 39 Eliz. c. 4; 3 Jac. 1, c. 21; 13 Anne, c. 26; 10 Geo. 2, c. 28; 28 Geo. 3, c. 30.

(*b*) *Shelley v. Bethell*, 12 Q. B. D. 11.

(*c*) *Wigan v. Strange*, Law Rep., 1 C. P. 175; *Shelley v. Bethell* (*supra*).

(*d*) 6 & 7 Vict. c. 68, s. 2; and see *Fredericks v. Howie*, 1 H. & C. 381; and *Fredericks v. Payne*, *ib.* 584, as to unlicensed theatres.

(*e*) 6 & 7 Vict. c. 68, s. 3.

(*f*) Sect. 10.

of a stage play, in a place (not being a patent theatre) which is not duly licensed (*g*). Moreover, the justices are empowered to make suitable rules for ensuring order and decency in the theatres licensed by them, and for regulating the times when they are to be open,—which rules may be rescinded or altered by a secretary of state; and in the case of a riot, or for breach of any regulation in the theatre, the justices may order the same, if licensed by them, to be closed; and the lord chamberlain, as to theatres licensed by him, and also as to patent theatres, may, in the case of a riot or on any public occasion whatever, order the same to be closed (*h*).

The 6 & 7 Vict. c. 68, has also provided, that one copy of every new stage play,—and, indeed, of every new act, scene, part, prologue, or epilogue of a play,—intended to be acted for hire at any theatre in Great Britain, shall be sent seven days previously to the lord chamberlain for his allowance; and without such allowance, it shall not be lawful to act the same (*i*); and the lord chamberlain may also forbid (under penalties in case of disobedience) the representation or performance of any stage play, or part thereof, in any theatre whatever, whenever such a course shall appear to him advisable, whether for the preservation of good manners or decorum, or with a view to preserve the public peace (*k*).

It will be remembered, that, as stated in an earlier part of this work (*l*), all the business of the justices in respect of the licensing of houses or other places for the public execution of stage plays, has now been transferred, by the Local Government Act, 1888, to the county council for the county or county borough; but the County Council may delegate this business to justices in petty sessions (*m*).

(*g*) 6 & 7 Vict. c. 68, s. 11.

(*h*) Sect. 8.

(*i*) Sect. 12.

(*k*) Sect. 14.

(*l*) *Vide supra*, p. 37.

(*m*) 51 & 52 Vict. c. 41, s. 28.

CHAPTER XIII.

OF THE LAWS RELATING TO PROFESSIONS.

IN most employments the rewards resulting from success ensure, in general, that they will not be undertaken without the necessary qualifications ; but there are certain professions which are productive of evils so serious (when improperly exercised), as to make it proper to subject them to the restraints of legal regulation ; and of these professions, medicine and law are the two to the regulation of which the legislature has principally directed its attention.

I. As to the MEDICAL PROFESSION.—The necessity of placing under legal supervision the practitioners both of physic and of surgery was early acknowledged ; for so long ago as the third year of Henry the Eighth, it was enacted, that no person within London (or seven miles thereof) should (unless he were a graduate in medicine or surgery of one of the two universities) practise as a physician or surgeon without examination and licence (*a*). And in furtherance of this enactment, by royal charter dated the 23rd September, 10 Hen. VIII., and confirmed by the 14 & 15 Hen. VIII. c. 5, and 32 Hen. VIII. c. 40, a college of physicians in London was established (*b*) ; and

(*a*) 3 Hen. 8, c. 11.

(*b*) The charter of Henry VIII. was subsequently *enlarged* (being at the same time *confirmed*) by the Act 1 Mar. sess. 2, c. 9, and by certain other charters of later

dates, viz., the 8th of October, in the fifteenth year of James the First ; and the 26th of March, in the fifteenth year of Charles the Second.

it was ordained, that this college should choose four physicians yearly, to supervise all others within London and seven miles thereof, “as also their medicines and receipts,”—so that such as offended should be punished with fines, imprisonment, or other means; and no person was to be at liberty to practise physic or surgery, within that area, except by the licence of the college (c); and the bishop was originally associated with the faculty for the purpose of this licence. And, as regards *surgeons* (otherwise called at that time *barbers*), the Act 3 Hen. VIII. was amended and added to by the 32 Hen. VIII. c. 42 and 34 & 35 Hen. VIII. c. 8; and afterwards, by a charter in their favour bearing date the 15th of August, 5 Car. I., all persons (except such physicians as therein mentioned) were prohibited from exercising, within London and Westminster (or within seven miles from London), the profession of *surgeon* for profit,—unless first duly examined and admitted by the “united company of barbers and surgeons of London”; and ultimately by the 18 Geo. II. c. 15, and a charter dated the 22nd of March, 40 Geo. III., and a charter dated the 14th of September, in the seventh year of Victoria, “The Royal College of Surgeons of England” was established in its present constitution. And by the last-mentioned charter, a new class of members, called *fellows*, was also created, from and by whom the council of the college was to be in future elected; and all future examiners were to be elected by, and to hold their office at the pleasure of, the council; but no bye-law or ordinance thereafter to be made by the council was to be of any force,—until the royal approbation thereof had been signified to the college, under the hand of a principal secretary of state, or until it had been otherwise approved, in such manner as parliament should direct.

(c) *R. v. Askew*, 4 Burr. 2186; *Rose v. Physicians' College*, 5 Bro. P. C. 553; *Collins v. Carnegie*, 1 Ad. & El. 695.

As regards *apothecaries*, this class of medical practitioners first obtained a charter from James the First; which charter was afterwards confirmed and enlarged by the 55 Geo. III. c. 194 (commonly called “The Apothecaries Act”); and the Apothecaries Act (which did not, of course, affect the privileges of either of the two universities, or of the College of Physicians, or of the College of Surgeons, or even (further than as was expressed) the privileges of the Society of Apothecaries) (*d*), has been itself recently amended, in some material respects, by the Apothecaries Act Amendment Act, 1874 (*e*). And the general effect of the charter and Acts is, that no person shall practise as an apothecary, or act as an assistant to an apothecary, in any part of England or Wales, unless he shall, after being duly examined, have received a certificate, of his being duly qualified in that behalf, from the “Society of the Art and Mystery of Apothecaries of the City of London”; and it is provided, that such a certificate shall not be granted to any person below the age of twenty-one (*f*),—nor to any but such as have served an apprenticeship of five years to some apothecary, and who can produce testimonials of sufficient medical education and good moral conduct; and any person practising without a certificate is not only disabled from recovering his charges (*g*), but is also made liable to a penalty of 20*l.* for every offence (*h*). Power is also given to the society, to strike off from the list of their licentiates any person who shall be convicted of any crime,—or who, after due inquiry by the “general council” of medical education, (presently to be mentioned,) shall be judged to have

(*d*) *The Apothecaries' Company v. Warburton*, 3 B. & Ald. 40. *Leman v. Fletcher*, Law Rep., 8 Q. B. 319.

(*e*) 37 & 38 Vict. c. 34.

(*f*) As to the certificate, see *1 Car. & P. 264*; *The Apothecaries' Company v. Greenwood*, 2 B. & Adol. 709.

(*g*) 55 Geo. 3, c. 194, s. 21;

Adol. 709.

been guilty of infamous conduct in any professional respect (*i*) ; and any licentiate refusing to compound or sell, or negligently compounding or selling, any medicines as directed by any prescription or order signed with the initials of any physician lawfully licensed, incurs certain penalties (*j*). And, further, the society of apothecaries—or any two or more qualified persons by them appointed—may at all reasonable times in the daytime enter any apothecary's shop, and examine whether the medicines and drugs there kept be wholesome, and may destroy such as they find otherwise, and report the names of the offenders ; who are made thereupon liable to a fine of 5*l.* for the first, 10*l.* for the second, and 20*l.* for the third offence (*k*). But the Apothecaries Act did not extend (*l*) to the business of a *chemist and druggist*, with reference to the buying, preparing, compounding, dispensing (*m*), and vending of drugs, medicines, and medicinale compounds, wholesale and retail. However, by the 15 & 16 Vict. c. 56 ; 31 & 32 Vict. c. 121 ; and 32 & 33 Vict. c. 117, no person may now assume the title of a chemist or druggist, or sell by retail (or compound) the *poisons* specified in the Acts, unless he has been examined, and has obtained a certificate, and been placed on the register, of the “Pharmaceutical Society of Great Britain” (*n*). And the Acts last mentioned contain also provisions with regard to the sale of poisons *generally*, requiring them to be distinctly labelled as such, and with the name and address of the seller (*o*) ; and the sale of *arsenic* in particular (unless when supplied wholesale or on a medical prescription) is

(*i*) 37 & 38 Vict. c. 34, s. 4.

(*j*) 55 Geo. 3, c. 194, s. 5.

(*k*) Sect. 3.

(*l*) Sect. 28.

(*m*) *Apothecaries' Company v. Burt*, 5 Exch. 363.

(*n*) See also the 61 & 62 Vict. c. 25 (“The Pharmacy Acts

Amendment Act, 1898”), under which registered apprentices and students of pharmacy become “*student-associates*” of the society, and registered chemists and druggists become members thereof.

(*o*) *Perry v. Henderson*, Law Rep., 5 Q. B. 296.

subject, under the 14 & 15 Vict. c. 13, to certain special rules, which require certain particulars to be signed by the purchaser, these particulars stating (among other things) the purpose for which the arsenic is required ; and where the purchaser is unknown to the vendor, the sale must also be in the presence of some common acquaintance ; and the arsenic must, in general, be coloured with an *admixture of indigo or soot*.

Such were the different charters and statutes by which the medical profession in England, in its various branches, was principally governed till the year 1858, when the Medical Act, 1858 (21 & 22 Vict. c. 90), was passed ; which Act has since been amended by a variety of Acts, including the 22 Vict. c. 21 ; 23 & 24 Vict. cc. 7, 66 ; 25 & 26 Vict. c. 91 ; 38 & 39 Vict. c. 43 ; 39 & 40 Vict. cc. 40, 41 ; and more particularly by the Medical Act, 1886 (49 & 50 Vict. c. 48) ; and of the provisions of these Acts some account must now be given.

By these Acts, then, a “ General Council ” of medical education and registration of the United Kingdom is established as a body corporate, with a perpetual succession and a common seal, and with capacity to hold lands for the purposes of the Acts (*p*) ; and such council consists of twenty members chosen from time to time by (one such member being chosen by each of) certain colleges, universities, and bodies—including the Royal College of Physicians of London, the Royal College of Surgeons of England, and the Apothecaries’ Society of London (*q*)—

(*p*) 25 & 26 Vict. c. 91, s. 1.

(*q*) The other colleges and bodies are the Universities of Oxford, Cambridge, London, Durham, Manchester (Victoria University), Edinburgh, Glasgow, Aberdeen, St. Andrews, and Dublin ; the Royal University of Ireland ; the

Royal College of Physicians of Edinburgh ; the Royal College of Surgeons of Edinburgh ; the Faculty of Physicians and Surgeons of Glasgow ; the King’s and Queen’s College of Physicians in Ireland ; the Royal College of Surgeons in Ireland ; and the

together with five (formerly six) persons nominated by the crown (*r*), and five persons elected from time to time by the registered medical practitioners of the United Kingdom (*s*), and together with a president who is elected by the council itself (*t*) ; and to this general council is entrusted the duty of carrying out, through the agency of their secretary, a system of registration of all medical practitioners, calculated to insure their addresses and qualifications being generally known,—the registers being (with this object) printed and published, and sold to the public, under the style of “The Medical Register” (*u*).

Upon these registers is entitled to be placed (on payment of a fixed fee) any person who, on the 1st October, 1858, was possessed of any one or more of the qualifications specified in the Medical Act, 1858, and which qualifications extended to (among others) members and licentiates of the medical colleges, and members or graduates of the universities and bodies above specified or referred to ; also, any one who thereafter, and prior to the Medical Act, 1886, and whether a male or female (*v*), became possessed of one or other of such qualifications, or who (subject to the last-mentioned Act) acquired the necessary qualification. But by the Medical Act, 1886, it has now been provided :—That no person shall thereafter be put on the register, in respect of any of the aforesaid qualifications, unless he has passed an examination (called the “qualifying examination”) by the Act appointed (*x*),—being an examination in medicine, surgery, and midwifery, held by the examining body in the Act appointed,

Apothecaries’ Hall of Ireland (21 & 22 Vict. c. 90, s. 4 ; 49 & 50 Vict. c. 48, s. 7).

(*r*) Of these five nominated persons, three are for England, one for Scotland, and one for Ireland. (49 & 50 Vict. c. 48, s. 7.)

(*s*) Of these five elected persons,

three are for England, one for Scotland, and one for Ireland. (*Ibid.*)

(*t*) 21 & 22 Vict. c. 90, s. 4 ; 49 & 50 Vict. c. 48, s. 9.

(*u*) 21 & 22 Vict. c. 90, s. 27.

(*v*) 39 & 40 Vict. c. 41.

(*x*) 49 & 50 Vict. c. 48, s. 2.

before inspectors (*y*), and with or without the aid of assistant examiners (*z*). But as regards “colonial” and “foreign” practitioners so called, a separate list in the register is assigned for each of these classes of practitioners (*a*) ; and as regards such colonies and foreign countries as allow the like reciprocal privileges to our own registered medical men (*b*), any person who holds a recognized colonial medical diploma (*c*), or a recognized foreign medical diploma (*d*), and is of good character, and has practised for the period (of ten years) prescribed by the Act in that behalf, may be admitted on the register,—such “recognized diploma” being one which (in the opinion of the general council) sufficiently guarantees the requisite knowledge and skill for the efficient practice of medicine, surgery, and midwifery (*e*). The council, it need hardly be stated, is subject to the supervision of Her Majesty in her Privy Council, as regards its execution of the various duties assigned to it by the Medical Acts (*f*).

Such being the different classes of persons entitled to be registered, the Acts proceed to provide, that none other than registered persons shall be entitled to claim the title of legally or duly qualified medical practitioners (*g*) ; nor to recover any charge in any court of law for any medical or surgical advice or attendance (*h*), or for the performance of any operation, or for any medicine which they have both prescribed and supplied (*i*) ; nor to hold any of the government or other medical appointments specified in the Act (*j*) ; nor to sign any certificate required by Act of Parliament to be signed by a medical

(*y*) 49 & 50 Vict. c. 48. s. 3.

(*z*) *Ibid.* s. 5.

(*a*) *Ibid.* s. 14.

(*b*) *Ibid.* s. 17.

(*c*) *Ibid.* s. 11.

(*d*) *Ibid.* s. 12.

(*e*) *Ibid.* s. 13.

(*f*) *Ibid.* s. 19.

(*g*) 21 & 22 Vict. c. 90, s. 34 ;

and see (as to *veterinary* surgeons)
44 & 45 Vict. c. 62.

(*h*) *De la Rosa v. Prieto*, 16 C. B.
(N.S.) 578 ; *Leman v. Houseley*,
Law Rep., 10 Q. B. 66.

(*i*) 21 & 22 Vict. c. 90, s. 32 ;
Wright v. Greenroyd, 1 B. & S.
758.

(*j*) Sect. 36.

practitioner (*k*). And any person who wilfully and falsely pretends to be, or takes or uses the name or title of, a physician, doctor, surgeon, general practitioner, apothecary,—or any name, title, addition, or description, implying that he is registered or recognized by law in such assumed capacity,—may be summarily convicted and fined, the fine (which is not to exceed twenty pounds) being paid to the treasurer of the council towards the general expenses of the Acts (*l*). And every person duly registered (and unless and until his name is, for due cause, erased from the register by the council) (*m*) is entitled, according to his qualification, to practise medicine or surgery, or both (as the case may be), in the United Kingdom (*n*), and (subject to any local law) in any of her Majesty's dominions (*o*); and he is also entitled to recover in any court of law, with full costs of suit, reasonable charges for professional aid, advice, and visits, and the costs of any medicines or other medical or surgical appliances by him supplied to his patients (*p*), subject to this qualifying proviso with regard to *physicians*, whose employment (like that of barristers) had always previously been held to be of a merely honorary description and insufficient—unless in virtue of an actual contract (*q*)—to support an action for their fees (*r*), namely, that if he is a fellow (formerly either a fellow or a member) of any college of physicians, the fellows of which (formerly either the fellows or the members of which) are disentitled by bye-law of the college to sue for their fees, then such

(*k*) 21 & 22 Vict. c. 90, s. 37.

(*l*) Sects. 40, 42, 43; *Ellis v. Kelly*, 6 H. & N. 222; *Hunter v. Clare*, [1899] 1 Q. B. 635.

(*m*) *Ex parte La Mert*, 4 B. & Smith, 582; *Leeson v. General Council*, 43 Ch. Div. 366.

(*n*) Sect. 21; *Turner v. Reynall*, 14 C. B. (N.S.) 328.

(*o*) 49 & 50 Vict. c. 48, s. 6.

(*p*) *Davies v. Makina*, 29 Ch. Div. 596.

(*q*) *Veitch v. Russell*, 3 Q. B. 928.

(*r*) Co. Litt. 265, n.; *Chorley v. Balcot*, 4 T. R. 317; *Little v. Oldaker*, 1 Car. & M. 370; *Buttersby v. Lawrance*, *ib.* 277.

bye-law may be pleaded in bar to any action commenced for the recovery thereof. But as regards *surgeons*, they have always been held entitled to recover a reasonable compensation for their services, even in the absence of a special contract (*s*). And in addition to the power of recovering their charges thus expressly conferred on registered medical practitioners, they are also exempted, if they so desire, from serving on juries or inquests, or in the militia, or in any municipal or parochial office (*t*).

Besides its functions with reference to keeping the register of qualified medical practitioners, the council is also invested with the right, and is under a duty, to lay a representation before the Privy Council, if it finds that any of the bodies entitled by the Acts to hold examinations and to grant medical diplomas, attempts to impose upon any candidate for examination any obligation to adopt, or to refrain from adopting, the practice of any particular theory of medicine or surgery (*u*); and the general council may require information from any such bodies as to the course of study and examination which they require from candidates, and in like manner may represent the case to the Privy Council, if such course of study seems not such as to secure the possession of the requisite knowledge and skill; and the Privy Council may (either for a time or altogether) deprive such body, so reported, of the power of granting qualifications (*x*). The president of the general council is also constituted the “returning officer” for the purpose of the electing of the five representatives elected by the registered medical practitioners of the United Kingdom (*y*); and such

(*s*) *Lipscombe v. Holmes*, 2 Camp. 441; *Baxter v. Gray*, 4 Scott, N. R. 374; *Simpson v. Rolfe*, 4 Tyr. 325; *Richmond v. Coles*, 1 Dowl. (N.S.) 560.

(*t*) 21 & 22 Vict. c. 90, s. 35; 33 & 34 Vict. c. 77.

(*u*) 21 & 22 Vict. c. 90, s. 23.

(*x*) Sects. 18—21; 49 & 50 Vict. c. 48, s. 4.

(*y*) 49 & 50 Vict. c. 48, s. 8.

president (saving the rights of the existing president) is to be chosen by the general council from their own number, and is to hold office for a term not exceeding five years (z). The Medical Acts also vest in the general medical council the copyright of the “British Pharmacopœia”; and provide for the publication, by the general council, of a new “British Pharmacopœia.” And lastly the Acts provide, that her Majesty may grant to the corporation of the Royal College of Physicians of London a new charter under the name of the “Royal College of Physicians of England,” the acceptance of which is to operate as a surrender of all previous charters (except that granted by Henry VIII.), and also of all the privileges conferred by or enjoyed under the 14 & 15 Hen. VIII. c. 5, which shall be inconsistent with such new charter; and they contain also provisions with regard to granting fresh charters to the Royal College of Physicians of Edinburgh, under the name of the “Royal College of Physicians of Scotland,” and to “The Royal College of Physicians of Ireland,” and to the “Royal College of Surgeons of Scotland.”

Before leaving the subject of the medical profession, we must notice the 2 & 3 Will. IV. c. 75 (amended by 34 Vict. c. 16), intituled “An Act for regulating Schools of Anatomy,” by which (after abolishing the former practice of the *dissection* of criminals after their execution) it is provided, that the executor or other person having lawful possession of the body of a deceased person, and not being intrusted with it for interment only, may permit the body of such person to undergo anatomical examination,—unless in his lifetime the deceased shall have expressed, in such manner as in the Act specified, a wish to the contrary; or unless the surviving husband or wife, or other known relation of the deceased,

shall object (*a*) ; and further, that the secretary of state for the home department may grant licences to practise anatomy, to any members of the royal college of physicians or surgeons, or to any graduates or licentiates in medicine, or to any professor or teacher of anatomy, medicine, or surgery, or to any student attending any school of anatomy, the application for such licence being countersigned by two justices of the peace ; and persons so licensed may receive or possess for anatomical examination, or examine anatomically, under such licence and with such permission as aforesaid, any dead body ; but no anatomical examination is to be conducted, save at some place of which the secretary of state has had a week's notice ; and the secretary of state may appoint inspectors for all such places, who are to make quarterly returns, as to the dead bodies carried in for examination there.

And lastly, we must notice the Dentists Act, 1878 (*b*), by which it is provided, that, after the 1st August, 1879, no person shall be entitled to call himself a “*dentist*” or to practise as such (under a penalty), unless he is registered as a dentist ; and he can now only be so registered after passing a compulsory examination, and receiving thereupon a certificate of fitness to practise (*c*) ; but if and when registered, he may so describe himself and so practise, and may also recover his proper fees and charges, these provisions not interfering with any legally qualified medical practitioner (*d*). And the Act provides for the general council, by its registrar, keeping a “*dentists' register*” (*e*) ; and the persons entitled to be entered in such register include licentiates, in dental surgery or in dentistry, of any of the medical bodies or universities

(*a*) *The Queen v. Feist*, 27 L. J. M. C. 164.

(*b*) 41 & 42 Vict. c. 33, amended (in some few particulars) by the Medical Act, 1886 (49 & 50 Vict.

c. 48), s. 26 ; *Reg. v. Medical Council*, [1897] 2 Q. B. 203.

(*c*) Sect. 18.

(*d*) Sects. 3—5.

(*e*) Sect. 11.

before mentioned ; also, persons *bonâ fide* practising dentistry on the 22nd July, 1878 (when the Act passed), and certain foreign and colonial dentists who may choose to avail themselves of the privileges of the Act (*f*).

II. AS TO THE LEGAL PROFESSION.—We here speak of *solicitors*, not of barristers ; and we shall treat of the law relating to solicitors generally (*g*), a name which, since the coming into operation of the Judicature Acts, 1873—1875, includes also *attorneys-at-law* and *proctors* (*h*). Now the law relating to solicitors is (for the most part) contained in the Acts 6 & 7 Vict. c. 73 ; 7 & 8 Vict. c. 86 ; 14 & 15 Vict. c. 88 ; 23 & 24 Vict. c. 127 ; 33 & 34 Vict. c. 28 ; 34 & 35 Vict. c. 18 ; 35 & 36 Vict. c. 81 ; 37 & 38 Vict. c. 68 ; 38 & 39 Vict. c. 79 ; 39 & 40 Vict. c. 66 ; 40 & 41 Vict. c. 25 ; 44 & 45 Vict. c. 44 ; 51 & 52 Vict. c. 65 ; and 57 & 58 Vict. c. 9 (*i*) ; and of these statutes the most important are the 6 & 7 Vict. c. 73 ; 23 & 24 Vict. c. 127 ; 33 & 34 Vict. c. 28 ; 40 & 41 Vict. c. 25 ; and 51 & 52 Vict. c. 65,—called respectively the “Solicitors Acts, 1843, 1860, 1870, 1877, and 1888,” and the Act 44 & 45 Vict. c. 44, which is called the “Solicitors’ Remuneration Act, 1881.”

By these statutes, and in particular by the Solicitors Act, 1843, it is enacted, that no person shall act as a solicitor, or (as such) sue out any writ or process, or commence, carry on, solicit, or defend any action or other proceeding, in the name of any other person, or in his

(*f*) 41 & 42 Vict. c. 33, s. 6.

(*g*) As to *notaries public*, see 41 Geo. 3, c. 79 ; 6 & 7 Vict. c. 90 ; 33 & 34 Vict. c. 97, in sched. ; 40 & 41 Vict. c. 25, s. 17 ; *The Queen v. Scriveners’ Company*, 3 Q. B. 939.

(*h*) *The Queen v. Scriveners’ Company* (*supra*).

(*i*) See (as to the admission of *colonial* solicitors to practise in England) 20 & 21 Vict. c. 39 ; 37 & 38 Vict. c. 41 ; 51 & 52 Vict. c. 65 ; and (as regards solicitors in Ireland) 61 & 62 Vict. c. 17.

own name, in any court of civil or criminal jurisdiction, or in any court of law or equity in England or Wales,—unless he shall have been admitted, enrolled, and be otherwise duly qualified, to act as a solicitor, either previously to, or else in pursuance of, the Acts (*k*) ; and any person acting contrary to this enactment is guilty of *contempt of court*, and is incapable of recovering his fees, and is liable to a penalty of 50*l.* (*l*) ; also, by the County Courts (Costs and Salaries) Act, 1882 (45 & 46 Vict. c. 57), s. 2, no one but a duly qualified solicitor may practise in the county courts (*m*).

To entitle a person to be admitted and enrolled as a solicitor, it is, in the first place, required of him in general that (having been previously duly *articled* (*n*) to some practising solicitor (or firm of solicitors) (*o*) in England or Wales) he shall have actually served him as clerk for *five* years (*p*) ; but a service of *four* years will suffice, if the candidate shall have passed certain prescribed examinations at Oxford, Cambridge, Dublin, Durham, or London, or at the Queen's University in Ireland, or in any of the universities in Scotland, or in any other university, college, or educational institution (*e.g.*, the College of Aberystwith in Wales) which shall be specified in that behalf in

(*k*) 6 & 7 Vict. c. 73, s. 2.

(*l*) *Ex parte Buchanan*, 8 Q. B. 833 ; *In re Walter Simmons*, 15 Q. B. D. 348.

(*m*) *Reg. v. Snagge*, [1894] 2 Q. B. 440. Clerks to guardians need not be solicitors, in order to practise before magistrates (7 & 8 Vict. c. 101, s. 68) ; also, mere copying work, or engrossing, is not solicitors' work. (*Incorporated Law Society v. Waterlow*, 8 App. Ca. 407.)

(*n*) The *articles* must be registered with the Society as Registrar

of Solicitors (51 & 52 Vict. c. 65, s. 7) ; and if not registered within six months of their date, they may be registered subsequently ; but in that case, the service under them dates from the date of registration (sect. 7) ; also, *fresh* articles (under Solicitors Act, 1843, s. 13), where there are any such, must be registered. (Sect. 9.)

(*o*) *In re Holland*, Law Rep., 7 Q. B. 297.

(*p*) *Ex parte Moses*, Law Rep., 9 Q. B. 1.

accordance with the 40 & 41 Vict. c. 25, s. 13 (*q*); and a service of *three* years only is required, if he shall have taken a degree (after such examinations and under such circumstances as are mentioned in the Acts) at any of the above Universities (*r*); or if he shall have been admitted to the degree of a barrister (*s*); or shall have been, for the term of ten years, a clerk to some practising solicitor or proctor (*t*); or if he shall have been admitted and enrolled as a writer to the Signet, or as a solicitor in the Supreme Courts of Scotland, or as a procurator before any of the sheriff's courts (*u*); and under the Solicitors Act, 1877 (40 & 41 Vict. c. 25), s. 12, a barrister of five years' standing may, without any period of service, pass the final examination and be admitted as a solicitor,—provided he has procured himself to be disbarred with that intention, and has obtained the certificate of two benchers of his Inn, that he is fit to practise as a solicitor.

And in order to the clerk's admission and enrolment as a solicitor, it is, in the next place, required of him, that, in addition to and subsequently to such service, he shall have passed a certain examination, called his *final examination*,—touching his articles and service, and his fitness and capacity to practise and to be an officer of the Supreme Court (*v*);

(*q*) See Reg. dated 5th December, 1877; 23 & 24 Vict. c. 127, s. 5; *Ex parte Bridford*, 1 E. & E. 417.

(*r*) 23 & 24 Vict. c. 127, s. 2, repealing 6 & 7 Vict. c. 73, s. 7.

(*s*) *Ibid.* s. 3.

(*t*) *Ibid.* s. 4; *In re Sherry*, Law Rep., 3 Q. B. 164.

(*u*) Sect. 15.

(*v*) Candidates, before they can be bound under articles of service, must in general pass a *preliminary* examination in general knowledge; and clerks under articles (unless

exempted under the 57 & 58 Vict. c. 9, on the ground of having obtained a degree in law at some university) have to pass an *intermediate* examination, to ascertain the progress they have made in their studies; which two examinations (as also the *final* examination), by 40 & 41 Vict. c. 25, are conducted by, and are subject to the regulations of, the Incorporated Law Society (Reg. dated 27 Nov. 1877),—the president of the Queen's Bench Division and the Master of the Rolls having a

and which examination is conducted by the Incorporated Law Society (*x*).

Upon the competency of the candidate for admission being certified, an oath used to be administered to him to the effect, "that he would truly and honestly demean himself in practice," and also the oath of allegiance; and after such oaths, he was "admitted," and his name was duly enrolled,—his admission being first duly written on parchment, and impressed with the proper stamp (*y*); but a simplification in the mode of admission has been effected by the Solicitors Act, 1888 (*z*), that statute having (by sect. 10) enacted, that, from and after the 1st February, 1889, a candidate who has obtained from the Society a certificate of having passed his final examination may apply to the Master of the Rolls to be admitted as a solicitor; and thereupon the Master of the Rolls, in the absence of any cause to the contrary, is by writing under his hand to admit the applicant; and (by sect. 11) on production of this admission, and on payment of a fee, not exceeding 5*l.*, to the Society, his name is entered by the Society on the roll of solicitors.

The Solicitors Act, 1843, provided for the appointment of a *Registrar*,—whose duty it should be to keep an alphabetical list or roll of all solicitors, and to issue certificates to persons who had been duly admitted and enrolled; and the duties of this office, which were temporarily committed

discretionary jurisdiction as regards the requirements of the society.

(*x*) The provisions of the Solicitors Act, 1843, as to articles and service thereunder, and as to examinations and admissions, &c., do not apply to the officials following, although sometimes called solicitors, namely:—the solicitor to the Treasury (as to whom, see 39 & 40 Vict. c. 18); the solicitor to

the Customs, to the Excise, to the Post Office, to the Inland Revenue, or any other branch of the revenue; nor to the solicitor of the city of London; nor to the solicitor to the Board of Ordnance, or to the Council of the Admiralty or Navy. (Sect. 47; 23 & 24 Vict. c. 127, s. 16.)

(*y*) 40 & 41 Vict. c. 25, Sched. II., Pt. II.

(*z*) 51 & 52 Vict. c. 65.

to the “Incorporated Law Society” (*a*), and were afterwards discharged by the Clerk of the Petty Bag, have now been definitely entrusted to the Incorporated Law Society, as the *Registrar* of Solicitors (*b*).

A certificate from the Registrar, of due admission and enrolment, must be produced to the proper authorities, by any person desirous of practising as a solicitor, in order that it may be duly impressed with the proper stamp duty, authorizing him to practise for the ensuing year (*c*); and in order to obtain the Registrar’s certificate, a declaration in writing, (signed by the solicitor desirous of practising, or by his partner, or in some cases by his London agent,) containing his name and address, and the date of his admission, must be delivered to the Registrar (*d*). A solicitor who practises in any court, without having a stamped certificate for the current year, is incapable of maintaining any action to recover his professional charges (*e*),—a rule which does not, *semble*, apply to non-litigious business (*f*); but even as regards litigious business, all proceedings taken therein (although by an uncertificated solicitor) hold and remain good as between and against the parties (*g*); and in case the certificate is not renewed yearly, then after the lapse of one year it used not to be renewable, without an order of the Master of the Rolls; but under the Solicitors Act, 1888, s. 16, the Society may

(*a*) 6 & 7 Vict. c. 73, s. 21.

(*b*) 51 & 52 Vict. c. 65, s. 5.

(*c*) 6 & 7 Vict. c. 73, s. 22; 23 & 24 Vict. c. 127, s. 18. The stamp on the *yearly* certificate is regulated by the Stamp Act, 1891 (continuing the like provision contained in the Stamp Act, 1870) as follows:—If the solicitor resides within ten miles from the general post office in the city of London, and shall have been admitted three years, 9*l.* (or, if he shall not

have been admitted three years, 4*l.* 10*s.*); if he shall reside elsewhere, and shall have been admitted three years, 6*l.* (or, if he shall not have been so long admitted, 3*l.*).

(*d*) 6 & 7 Vict. c. 73, s. 23.

(*e*) Sect. 26; *Brunswick v. Crowl*, 4 Exch. 492; *Re Fowler*, 4 Q. B. D. 334.

(*f*) *Greene v. Reece*, 8 C. B. 88.

(*g*) *Sparling v. Brereton*, Law Rep., 2 Eq. Ca. 64.

(as Registrar) simply grant a renewal, or (subject to appeal to the Master of the Rolls) refuse to grant a fresh certificate; and in such case, the Master of the Rolls may, in his judicial discretion, either refuse to interfere, or may direct a fresh certificate to issue on terms (*h*).

The Solicitors Act, 1843, also contains the following (among other) regulations :—That no solicitor shall have more than two articled clerks at one and the same time, nor any such clerk while he himself acts as a clerk; and that a clerk, articled for five years to a solicitor, may serve one of those years as a pupil with a practising barrister,—or with the London agent of the solicitor to whom he is articled (*i*); and that a clerk whose master has died or left off business during the term, or whose articles have been cancelled or discharged (*k*), may enter into new articles with another master for the residue of the term (*l*); also, that no solicitor, who is in prison, may, in his own name or in the name of any other solicitor, commence, prosecute, or defend any action or other judicial proceeding, or maintain an action for fees for any such business done during his confinement (*m*).

(*h*) *Re Chaffers*, 15 Q. B. D. 467; 40 & 41 Vict. c. 25, in part re-enacting 23 & 24 Vict. c. 127, s. 23.

(*i*) 6 & 7 Vict. c. 73, s. 6. By 23 & 24 Vict. c. 127, s. 10, the clerk under articles is, with certain excepted cases, restricted (during his term of service) from holding any office, or engaging in any employment, other than that of clerk to his master or partner; but by 37 & 38 Vict. c. 68, s. 4, this restriction is removable, provided the consent in writing of the master be obtained, and the sanction of one of the judges or of the Master of the Rolls.

(*k*) In the event of the master becoming bankrupt, or being imprisoned for debt for twenty-one days, the court may discharge the clerk and assign his articles to a new master (6 & 7 Vict. c. 73, ss. 4, 5; 32 & 33 Vict. c. 62, s. 4); and a proportion of the premium paid, may be (but, in general, is not) recoverable on the death of the master (*Ferris v. Carr*, 28 Ch. Div. 409).

(*l*) 6 & 7 Vict. c. 73, s. 13; *Ex parte Wallis*, 2 B. & Smith, 416.

(*m*) 6 & 7 Vict. c. 73, s. 31.

Let us now turn to solicitors who have been duly admitted, and who have duly taken out their certificate, and duly renewed such certificate annually, and who (being in all other respects duly qualified) are in actual practice ; and let us consider the law relating to their work, and to their professional remuneration, and generally to their professional conduct. And here it may be premised that, taken as a whole, there is no body of men in the kingdom who are more highly educated or more industrious than these gentlemen are,—or more estimable in their private and in their professional behaviour ; and yet the law, jealous of their influence and opportunities, has made them subject to various restrictions, specific and general, having for their object the protection of their clients ; but which restrictions are in general so discreetly interpreted by the courts, and by the officials attached to the offices of the courts, as to be in their operation neither galling to the good and able solicitor, nor ineffective to punish the incapable and the evil-intentioned.

And we shall consider, although with great brevity, (I.) The privileges and disabilities of solicitors ; (II.) Their retainer, and the duties of their employment ; (III.) Their bills of costs and remuneration generally ; and (IV.) The remedies for and against solicitors, civil and criminal.

I. THE PRIVILEGES AND DISABILITIES OF SOLICITORS.—Solicitors being in actual practice are exempted from serving on juries (*n*), or as parish overseers, churchwardens, constables, and the like (*o*),—and generally from all public services of a personal character which might interfere with the due discharge of their professional duties ; but whereas formerly a solicitor was incapable of being a county justice (*p*), his disability in this respect has now been taken away, except as regards the county

(*n*) Jury Act, 1870 (33 & 34 Vict. c. 77, s. 9).

(*o*) 5 & 6 Vict. c. 109, s. 6.

(*p*) 6 & 7 Vict. c. 73, s. 33.

in which he carries on his practice (*q*). Solicitors are entitled to practise as solicitors in the Court of Appeal and in the High Court ; and to practise either as solicitors or as advocates (or as both) in the Bankruptcy Division of the High Court (*r*), and in the County Courts (*s*),—and generally in the Inferior Courts ; and they may (subject to the payment of a small fee) practise also as solicitors in the Court of the County Palatine of Lancaster (*t*) ; but their managing clerks may not (in effect) hold their briefs (*u*).

Solicitors are privileged from arrest (where arrest still exists) on civil process, while attending the courts in their capacity of solicitors, and while going to and returning from same (*v*) ; but they are not privileged from arrest on criminal process (*x*), or under a writ of attachment, or order of committal for contempt (*y*) ; and they used also to have this further privilege, namely, that of suing and being sued exclusively in the High Court ; but this latter privilege, either as to suing (*z*), or as to being sued (*a*), no longer exists.

II. THE RETAINER OF SOLICITORS, and THE DUTIES OF THEIR EMPLOYMENT.—The solicitor of a party litigant should, as a general rule, obtain from his client a written authority (*i.e.*, a written retainer) to act on his behalf ; but a verbal retainer is sufficient (*b*),—while, as regards non-contentious business, the retainer is in general implied from

(*q*) 34 & 35 Vict. c. 18.

(*r*) 46 & 47 Vict. c. 52, s. 151 ;
In re Elderton, W. N., (1887), p. 21.

(*s*) 15 & 16 Vict. c. 54, s. 10,
repealed (but the privilege continued) by 51 & 52 Vict. c. 43,
s. 188.

(*t*) 13 & 14 Vict. c. 43, s. 27.

(*u*) *Queen v. Oxford County Court*, [1894] 2 Q. B. 440.

(*v*) *Re Jewitt*, 33 Beav. 550.

(*x*) 1 Arch. Practice, 13th ed.,
pp. 652, 687.

(*y*) *Re Freston*, 11 Q. B. D. 545 ;
Re Dudley, 12 Q. B. D. 44.

(*z*) *Blair v. Eisler*, 21 Q. B. D.
185 ; 51 & 52 Vict. c. 43, s. 175.

(*a*) *Day v. Ward*, 17 Q. B. D.
703.

(*b*) *Wiggins v. Peppin*, 3 Beav.
403.

the circumstances. The authority may be either a general one, or it may be an authority limited to some particular matter, or to some particular proceeding in the action ; and in either case, it must not be exceeded (*c*). But if his authority is general, the contract is an *entire* contract, and the solicitor must accordingly see the business through to its end,—at least in general,—before he may sue for his remuneration (*d*). Also, under his general authority, the solicitor may submit to referring the action ; and may even, *semble*, agree to a compromise of it,—unless the client has expressly forbidden a compromise (*e*) ; but the solicitor may not, before action commenced, compromise his client's claim (*f*),—*scil.*, without the express consent of his client. The authority of the solicitor used in general to determine with the signing of final judgment in the action (*g*) ; but now it continues until the conclusion of the whole cause or matter (*h*). A solicitor who commences an action without authority to do so, is personally liable for all the costs thereof (*i*).

In the exercise of his employment, the solicitor must use judgment ; and although privileged from disclosing (and bound not to disclose) the communications and documents of his client (*k*), he is not justified in conspiring or combining with him to effect a fraud or a judicial wrong (*l*) ; but this matter of privileged communications will be more properly considered hereafter in connection with the

(*c*) *Spencer v. Newton*, 6 A. & E. 630 ; *Richardson v. Daly*, 4 M. & W. 384.

(*d*) *Underwood v. Lewis*, [1894] 2 Q. B. 306.

(*e*) *Chown v. Parrott*, 14 C. B. (N.S.) 174.

(*f*) *Macanlay v. Polley*, [1897] 2 Q. B. 122.

(*g*) *Tipping v. Johnson*, 2 B. & P. 357.

(*h*) *De la Pole v. Dick*, 29 Ch. D. 351 ; *De Mora v. Concha*, W. N., (1887), p. 194.

(*i*) *Schott v. Schott*, 19 Ch. D. 94 ; *Wray v. Kemp*, 26 Ch. D. 169.

(*k*) *Reg. v. Duchess of Kingston*, 11 St. Tr. 246.

(*l*) *Reg. v. Cox*, 14 Q. B. D. 153.

proceedings in an action (*m*). And as regards all private dealings between a solicitor and his client, *e.g.*, in the case of mortgages taken by the solicitor from his client, the utmost good faith must prevail on the solicitor's part (*n*). In case a solicitor is negligent in the conduct of his client's business, and a loss results therefrom to the client, the solicitor is civilly answerable for the loss (*o*).

III. SOLICITORS' BILLS OF COSTS, AND THEIR REMUNERATION GENERALLY.—Solicitors as such are entitled to be paid for their professional work; and they may either enter into an agreement with their client as regards their remuneration, or they may dispense with such agreement.

Firstly, where they enter into an agreement :—The agreement is of a special character, and is (in the general case) governed by the Solicitors Act, 1870, and the Solicitors' Remuneration Act, 1881. Prior to these Acts, a solicitor might (as he still may) agree his *past* costs, but not costs to be incurred (*p*); but he may now agree these latter costs, *i.e.*, his future costs (*q*). A solicitor may (if foolish enough to do so, or if the circumstances of the case persuade him to do so) agree, of course, to charge nothing for his labour (*r*), or to charge costs out of pocket only (*s*), or to charge in the event of success only (*t*), or to look for his costs only to the property to be recovered (*u*); but, as a rule, he makes no such foolish agreement, but enters into

(*m*) Book v. chap. x. *infra*.

(*n*) *Cockburn v. Edwards*, 18 Ch. Div. 449; *Macleod v. Jones*, 24 Ch. D. 289; *Pooley's Trustee v. Whetham*, 33 Ch. Div. 111.

(*o*) *Whiteman v. Hawkins*, 4 C. P. Div. 13; *Dooby v. Watson*, 39 Ch. Div. 178.

(*p*) *Re Russell*, 30 Ch. Div. 114;

Jennings v. Johnson, L. R. 8 C. P. 425.

(*q*) *Re Lewis*, 1 Q. B. D. 724.

(*r*) *Ashford v. Price*, 3 Stark. 185.

(*s*) *Jones v. Read*, 5 A. & E. 529.

(*t*) *Turner v. Tennant*, 10 Jur.

429, n.

(*u*) *Re Ingle*, 21 Beav. 275.

a proper agreement under the Acts; and seeing that, if the benefit of the Acts is to be obtained, strict regard must be had to their provisions,—it appears to be as well to state these provisions with some particularity.

(1.) By the Solicitors Act, 1870 (33 & 34 Vict. c. 28), it is provided, that an agreement may be validly made between a solicitor and his client respecting the amount and manner of his payment for either past or future services; but such agreements (so far as they relate to business in the courts, *i.e.* to contentious business, and the Act of 1870 is now limited to such business) must receive the sanction of a taxing officer of the court which has power to enforce the agreement,—that is to say, the amount payable under the agreement is not recoverable until the agreement itself has been allowed by such taxing master (*v*); and no action is to be brought on the agreement (*x*), any question arising under it requiring to be determined by the court on motion or petition. Moreover, any provision in the agreement, whereby the solicitor shall not be liable for negligence, or shall be relieved from any responsibility to which he would otherwise be subject, is wholly void; and the agreement, if in any way considered by the courts to be unfair or unreasonable, may be disallowed and set aside. Also, no validity is given by the statute to any purchase by a solicitor of his client's interest in the property involved in the action, or to an arrangement whereby he is to be paid only in the event of the success of the action,—both of which transactions are against the policy of the law (*y*). The agreement must also be in writing, and signed by both the parties to it (*z*); and the interests of third parties are not to be affected thereby; and the agreement is exclusive of all other

(*v*) *Re Solicitors Act*, 1870, 1 Ch. D. 573.

(*x*) *Rees v. Williams*, Law Rep., 10 Exch. 200.

(*y*) *Re Solicitors Act*, 1870, 1 Ch. D. 573.

(*z*) *Re Raven*, 30 W. R. 134; *Bewley v. Atkinson*, 13 Ch. D. 283.

claims, unless so far as it expressly excepts any such claims.

(2.) By the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), which limits the operation of the Solicitors Act, 1870, to contentious business, it is provided, as regards non-contentious business (that is to say, business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing), that an agreement may be validly made between a solicitor and his client, before or after or in the course of the business, for the remuneration of the solicitor, as regards both the amount and the manner thereof,—the agreement being in writing and signed by the person to be bound thereby, or by his agent in that behalf; and the agreement is to express, whether all or some only (and what) disbursements in respect of searches, travelling expenses, stamps, plans, and the like, are to be included or not in the agreed remuneration. And (by section 8, sub-s. 4) it is provided, that “the agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor (*a*); and if, under any order for taxation of costs, such agreement, being relied upon by the solicitor, shall be objected to by the client as unfair or unreasonable, the taxing master or officer of the court may inquire into the facts, and certify the same to the court; and if, upon such certificate, it shall appear to the court or judge that just cause has been shown either for cancelling the agreement, or for reducing the amount payable under the same, the court or judge shall have power to order such cancellation or reduction, and to give all such directions necessary or proper for the purpose of carrying such order into effect or otherwise consequential thereon, as to the court or judge may seem fit.”

(*a*) *Re Gray*, 30 Sol. Journ. 551.

Secondly, where no special agreement as to the solicitor's remuneration has been entered into between a solicitor and his client, either as to contentious business (under the Solicitors Act, 1870), or as to non-contentious business (under the Solicitors' Remuneration Act, 1881):—The amount and manner of his remuneration is governed, as to non-contentious business, by the Solicitors Act, 1843, and the Solicitors' Remuneration Act, 1881, and the rules thereunder; and as to contentious business, is governed by a vast number of statutes, and of orders and rules thereunder; and some short (although necessarily imperfect) statement of the law on these matters must here be made.

And firstly, by the Solicitors Act, 1843 (as regards both contentious and non-contentious business), it is provided, that no solicitor shall (as a general rule) commence an action or sue for his fees or charges in respect of any business done by him,—although the right of action is complete as soon as the business is done (*b*),—until after the expiration of one calendar month (*c*) after a bill of his costs and charges, signed by him, shall have been delivered to the party to be charged (*d*); and such party may, on the proper application, obtain an order referring the bill for taxation, and staying all proceedings for the recovery of the amount thereof in the meantime; or judgment for the amount to be ascertained on the taxation may (in a proper case) be given (*e*). And by the same Act, the client, or party chargeable with the costs, may have an order made on the solicitor directing him to deliver his bill of costs, when he has not done so; and the

(*b*) *Coburn v. Colledge*, [1897] 1 Q. B. 702.

(*c*) In special cases, the judge may otherwise order (38 & 39 Vict. c. 79),—*i.e.*, may dispense with this condition precedent.

(*d*) 6 & 7 Vict. 73, s. 37; *Re Nelson*, 30 Ch. D. 1; *Re Thompson*, 30 Ch. D. 441.

(*e*) *Lumley v. Brooks*, 41 Ch. Div. 323.

same order (or a further order) will direct the solicitor, on payment, to deliver up all deeds, papers, and other documents of the client in his possession touching the matters comprised in the bill of costs (*f*). And even after payment, a bill of costs may, on the ground of special circumstances, *e.g.*, of pressure (*g*) or manifest overcharges (*h*), be ordered to be taxed, provided the application is made within twelve months after payment (*i*); and if it is intended by the client to object to certain items in the bill as statute-barred, a special order (and not the common order) for taxation of the bill must be obtained (*k*). Where any part of the matters comprised in the bill of costs was transacted in any court, *e.g.*, in the courts now constituting the Queen's Bench Division, the taxation would be in that court (*l*); but where no part of the bill related to matters transacted in any court, the taxation was to be in Chancery (*m*); and these distinctions, although technically abolished by the effect of the Judicature Acts, are practically still in force (*n*), and are highly convenient (*o*).

And, secondly, the Solicitors' Remuneration Act, 1881, having (as regards non-contentious business) provided, that the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, and the President of the Incorporated Law Society, and the President of some provincial law society, to be selected by the Lord Chancellor, might (or that any three of them, the Lord Chancellor being one,

(*f*) 6 & 7 Vict. c. 73, s. 37;

Brooks v. Bockett, 9 Q. B. 847;

Ex parte Cobeldick, 12 Q. B. D.

149; *In re Debenham and Walker*, [1895] 2 Ch. 430.

(*g*) *Re Bennett*, 8 Beav. 467.

(*h*) *Re Thompson*, 8 Beav. 237.

(*i*) Sect. 41.

(*k*) *In re Margets*, [1896] 2 Ch.

(*l*) Sect. 37.

(*m*) *Ibid.*

(*n*) *Re Worth*, 18 Ch. D. 521; *Re Pollard*, 20 Q. B. Div. 656.

(*o*) See also the Mortgages (Legal Costs) Act, 1895 (58 & 59 Vict. c. 25), allowing solicitors who are mortgages to charge mortgages' costs.

might) from time to time make any general order for regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action (*p*), or transacted in any court, or in the chambers of any judge or master, and not being otherwise contentious business; and having further provided (by sect. 4), that any such general order might, as regards the mode of remuneration, prescribe that it should be according to a scale of rates of commission or percentage, varying or not in different classes of business, or by a gross sum, or by a fixed sum for each document prepared or perused without regard to length, or in any other mode, or partly in one mode, and partly in another or others; and might, as regards the amount of the remuneration, regulate the same with reference to all or any of the following (among other) considerations,—namely, the position of the party for whom the solicitor is concerned in any business, that is, whether as vendor or as purchaser, lessor or lessee, mortgagor or mortgagee, and the like; the place, district, and circumstances at or in which the business or part thereof is transacted; the amount of the capital money, or of the rent, to which the business relates; *the skill, labour, and responsibility involved therein on the part of the solicitor*; the number and importance of the documents prepared or perused without regard to length; and the average or ordinary remuneration obtained by solicitors in like business at the date of the passing of the Act; and having also provided (by sect. 5), that any such general order might authorize and regulate the taking by a solicitor from his client of security for future remuneration in accordance with any such order, such remuneration to be ascertained by taxation or otherwise; and might also authorize and regulate the allowance of interest on such

remuneration,—A General Order for the regulation of all the above matters has been made, and has been in operation since the 1st January, 1883 ; and the substance and effect of this order may be roughly stated as follows, that is to say :—As regards non-contentious business (to which alone this Act and the General Order thereunder are applicable), two modes of remuneration are provided, either (1.) By the percentage or commission appointed by Schedule I. to the General Order made under the Act as above mentioned ; or (2.) By the old method of remuneration as altered by Schedule II. to that order,—and the solicitor may elect between the two, provided he make his election before entering upon the business ; and if he do not so elect, then the former of these two methods of ascertaining his remuneration is the one which becomes applicable (*q*).

Schedule I. is sub-divided into two parts,—Part I. being in respect of sales, purchases, and mortgages ; and Part II. being in respect of leases, agreements for leases, and conveyances at a rent (not being mining leases, or building leases, or agreements for either) ; and Schedule II. provides generally for whatever is not covered by Schedule I. (in either of its Parts),—that is to say, for settlements, mining leases or licences and agreements therefor, re-conveyances, transfers of mortgages, and further charges, and generally all other matters of conveyancing (*r*), as also for all matters remaining uncompleted which would (if completed) fall within one or other of the two Parts of Schedule I. And as regards matters falling within Schedule I., the solicitor's remuneration is to be according to the scale of charges thereby prescribed, and which charges are by way of percentage on the amount of the purchase or mortgage money, or on the rental ; and as regards matters falling within Part I. of the schedule, a negotiation fee also, calculated at a percentage on the purchase or mortgage

(*q*) *Re Allen*, 34 Ch. D. 433 ; *Re Field*, 29 Ch. D. 608.

(*r*) *Stanford v. Roberts*, 26 Ch. D. 155.

money, is allowed in addition to the proper conveyancing remuneration (*s*),—but no such negotiation fee is allowed as regards matters falling within Part II. of that schedule (*t*).

As regards the matters regulated by the old system, as altered by Schedule II., the remuneration is not ascertained by percentage, but in the old way by folio, labour, and the like; and it is a special provision of this schedule, that in special cases the taxing master may, for special reasons, increase or diminish the prescribed allowances; and there is a somewhat similar provision to this, applicable to Schedule I., namely, that in respect of any business which is required to be, and which is, by *special exertion*, carried through in an exceptionally short space of time, the solicitor may be allowed, according to the circumstances, a proper additional remuneration for the special exertion.

For a more complete apprehension of the provisions of this General Order, the reader must be referred to the Order itself, and to the scales prescribed thereby, and to the particular rules comprised in the several parts of Schedule I. and in Schedule II.; and we shall here add only these two further remarks, namely:—(1.) The remuneration prescribed by Schedule I. does not include stamps, *counsel's fees*, auctioneer's or valuer's charges, travelling or hotel expenses, fees paid on searches to public offices, or on registrations, or to *stewards of manors*, or the like, or any extra work occasioned by changes occurring in the course of the business,—*e.g.*, by death, bankruptcy, or the like; and (2.) A solicitor may accept from his client (who may give him) security for the amount to become due to the solicitor for business to be transacted by him, and for interest on such amount,—but so that interest is not to commence till the amount due is ascertained, either by agreement or taxation; and a solicitor may charge interest at four per cent. per annum on his disbursements and

(*s*) *Re Newbould* (*sub nom.*
Newbould v. Bailward), 14 App.
Ca. 1.

(*t*) *Re Field*, 29 Ch. D. 608;
Re Emmanuel, 33 Ch. D. 40; *Re*
Allen, 34 Ch. D. 433.

costs, whether by scale or otherwise, from the expiration of one month from demand from the client ; and in cases where such disbursements and costs are payable by an infant, or out of a fund not presently available, such demand may be made on the parent or guardian, or the trustee or other person liable.

And, thirdly (as regards contentious business), where no special agreement as to the solicitor's remuneration therefor has been entered into, the provisions and rules applicable thereto are of too minute and detailed a character to admit of any condensed statement ; we can only refer to Order LXV. of the Orders and Rules of 1883 ; and to the more or less casual references to the costs of litigation in general, and in certain particular kinds or classes of actions, which will be found in our treatment of " Civil Injuries," in Book V. of this treatise.

IV. THE REMEDIES FOR AND AGAINST SOLICITORS, CIVIL AND CRIMINAL.—It has already appeared incidentally, that either the solicitor or the client may obtain an order for the taxation of his costs ; and such order is, in the ordinary case, obtained on an *ex parte* application ; and if the application therefor is made within a year from the delivery of the bill of costs, the order is made as a matter of course, or almost as a matter of course ; and if made in the Chancery Division, the order provides also for payment ; but if made in the Queen's Bench Division, the order is merely for taxation.

Where the order for taxation is not obtainable as of course, it is required to be obtained on a special application by summons, duly served by the applicant upon the other party,—such special application being, in general, necessary, after the lapse of the year ; also, after payment ; also, when the retainer is disputed ; and generally, when there is any special circumstance affecting more or less the right to payment.

The solicitor may also (but is not in general driven to)

bring an action for his costs (*u*) ; and conversely, an action is sometimes the only remedy of the client against the solicitor, —but this is only in very exceptional cases ; for, in general, the court exercises over solicitors a very wide summary jurisdiction, on applications intituled in the matter of the solicitor (*x*), and sometimes on applications not so intituled, but of which notice has been duly given to the solicitor (*y*) ; but it is to be remembered, that this summary jurisdiction is exerciseable only in matters affecting the solicitor as such, *e.g.*, for his personal misconduct, or for any breach or failure of his duty as a solicitor (*z*) ; and in all other cases an action must be brought against him, if there is any ground of action.

The court also exercises a punitive, or disciplinary, jurisdiction over solicitors, when their conduct is of a fraudulent character (*a*) ; or when they are guilty of any contempt of court (*b*) ; and the punishment may be by commitment to prison or by attachment, or (in the graver classes of cases) by suspension from practice, or by striking off the rolls (*c*),—the latter punishment not being in general inflicted, save after a report, formerly of the Master, but now of the Incorporated Law Society (*d*), made to the court, after an inquiry into the conduct of the solicitor.

(*u*) *Lumley v. Brooks*, 41 Ch. Div. 323.

(*x*) *Re Ward*, 31 Beav. 1 ; *Re Dangar's Trusts*, 41 Ch. Div. 178 ; *Swyny v. Harland*, [1894] 1 Q. B. 707.

(*y*) *Slater v. Slater*, 58 L. T. (N.S.) 149.

(*z*) *Ex parte Edwards*, 7 Q. B. D. 158.

(*a*) *Re Dudley*, 12 Q. B. D. 44.

(*b*) *Re Freston*, 11 Q. B. D. 545.

(*c*) *Re Hardwick*, 12 Q. B. D. 148.

(*d*) 51 & 52 Vict. c. 65, ss. 12, 13 ; *Reg. v. Incorporated Law Society*, [1896] 1 Q. B. 327.

CHAPTER XIV.

OF THE LAWS RELATING TO BANKS.

THE invention of banking appears to be due to the Republic of Venice ; where, so early as the year 1171, Jews were accustomed to keep benches in the market-place for the exchange of money and bills ; and *banco* being the Italian for *bench*, banks may have taken their denomination from this circumstance. In our own country, the business of banking appears to have been originally carried on chiefly by the goldsmiths ; for we find it recited in an Act of the 22 & 23 Car. II., “ that several persons, being *goldsmiths*, and others, by taking up or borrowing great sums “ of money, and lending out the same for extraordinary “ hire or profit, have gained and acquired to themselves the “ reputation and name of *bankers* ” (a). And at a later date, in the reign of William and Mary, the project was conceived of establishing in England a national institution of the same description with the banks then already established at Genoa and Amsterdam (b) ; and in 1694, an Act was passed sanctioning the creation of that great corporate body, which has since become so celebrated, under the denomination of “ The Governor and Company of the Bank of England,” or in popular language “ The Bank of England ” ; and many other banks, including private banks and joint-stock banks, have since been established, not to mention the savings banks which we treated of in a former chapter.

(a) Jacob’s Dict. in tit. Bankers.

(b) Its principal projector was Mr. William Paterson, a Scotch gentleman.

The Act by which the Bank of England was established is the 5 & 6 W. & M. c. 20 ; by which Act, after empowering their Majesties to incorporate, by letters patent, "The Governor and Company of the Bank of England," and after prohibiting the corporation from buying and selling goods, lest the lieges should be oppressed by their monopolizing or "engrossing any sort of goods, wares, or merchandize" (*c*),—it was provided and declared, that the Bank might deal in bills of exchange, or in buying and selling bullion, gold, or silver ; and might sell any goods whatsoever left with it in pledge, and not redeemed at the time agreed upon, or within three months after ; and might also sell goods, the produce of lands which it had purchased (*d*). And we find that as a fact, from the time of the passing of the Act or soon afterwards, the Bank began the practice, which it has ever since continued, of issuing its own notes (*e*). And by subsequent Acts, it was provided, that no other bank, or company in the nature of a bank, should be established by Act of Parliament within this kingdom (*f*) ; and that it should not be lawful in England for any other corporation (or for more than six persons associated in partnership) to borrow, owe, or to take up any money on their bills or notes, payable on demand, or at less time than six months from the borrowing thereof (*g*) ; and exclusive privileges, (popularly called the Bank Charter,) were conferred on the Bank of England.

Subject, however, to these exclusive privileges of the Bank of England, as the same were afterwards from time to time modified, the trade of banking has, from its first introduction, been always free, both in London and in the

(*c*) 5 & 6 W. & M. c. 20, s. 27.

(*d*) Sect. 28.

(*e*) *The Bank of England v. Anderson*, 3 Bing. N. C. 653, 654.

(*f*) 8 & 9 Will. 3, c. 20 ; 15 Geo. 2, c. 13 ; 35 & 36 Vict. c. 34.

(*g*) 39 & 40 Geo. 3, c. 28.

country ; but as regards these country banks, some of them have carried on business, like the Bank of England, as *banks of issue*,—that is, have made payments by their own notes ; while the other country banks, and all the London banks, have been *banks of mere deposit*,—that is, have made payments in cash and Bank of England notes only, and not in notes of their own.

The character of the Bank of England and of its transactions has always maintained an importance far greater than that of any other bank : for while it has carried on the business ordinarily incident to banking, such as taking deposits of money, issuing its own paper, and discounting mercantile bills, it has also been employed as a great engine of state, in paying the interest due to the holders of the public debt, in circulating exchequer bills (*h*), and in accommodating the government with immediate advances, on the credit of deferred funds, and in assisting it generally, in all the great operations of finance. But as regards the Bank's advances to the government, these are now subject to the restrictions imposed by the 59 Geo. III. c. 76, whereby it is enacted, in conformity with an earlier regulation in that behalf (*i*), that it shall not be lawful for the Bank to make advances of money to the crown in any manner whatever, without the express and distinct authority of Parliament for that purpose first obtained,—a restriction, however, which does not prohibit the Bank from *purchasing* exchequer bills or other government securities, or from advancing, upon the credit of exchequer bills or of Treasury bills lawfully issued, any money required to make good any quarterly deficiency in the Consolidated Fund (*k*). And in consideration of the services thus rendered, the Bank is favourably regarded by the government, its credit being in general protected

(*h*) 29 & 30 Vict. c. 25 ; and
40 & 41 Vict. c. 2.

(*i*) 5 W. & M. c. 20, s. 30.

(*k*) 59 Geo. 3, c. 19 ; 29 &
30 Vict. c. 39, s. 12 ; 40 & 41 Vict.
c. 2, s. 13.

in times of crisis (*l*) ; and, moreover, it is entitled to certain allowances for managing the public debt (*m*).

In the year 1826, the Bank was authorized to extend the circulation of its paper, by establishing banks of its own not under the immediate management of the Bank directors, but which should be carried on by the agents of the Bank, at any place or places in England where such a branch should be established (*n*) ; and in the same year, and apparently in consideration of this privilege, the Bank relinquished in part its old exclusive privileges, so as to allow (subject to certain conditions) the establishment of other banking companies, to wit, joint-stock banks, not carrying on business within sixty-five miles from London (*o*) ; but all Bank of England “notes on demand,” issued at any of its branch banks, must be made payable in coin at the place where such notes are issued ; and though the Bank of England is not liable to pay, at any of its branches, notes not made specially payable at such branch, it is, on the other hand, bound to pay *in London* all notes, whether those of the Bank of England itself or of any of its branches (*p*).

The Bank Charter had been originally limited to determine upon twelve months’ notice after 1st August, 1705 ; but this period was from time to time extended by successive Acts of Parliament, the charter being at the same time variously modified by one or other of such Acts (*q*) ;

(*l*) In the year 1797, owing to a temporary failure in public credit, and a consequent run upon the Bank, it was deemed necessary to relieve it for a limited period from the necessity of making payments in cash (see 37 Geo. 3, c. 45, continued, by subsequent Acts, until the 1st of May, 1823).

(*m*) 24 & 25 Vict. c. 3 (repealing 48 Geo. 3, c. 4, and 56 Geo. 3,

c. 97) ; 33 & 34 Vict. c. 71 ; 55 & 56 Vict. c. 48.

(*n*) 7 Geo. 4, c. 46, s. 15.

(*o*) *Ibid.* ss. 1—4.

(*p*) 3 & 4 Will. 4, c. 98, ss. 4, 6.

(*q*) 3 Geo. 1, c. 8 ; 15 Geo. 2, c. 13 ; 24 Geo. 2, c. 4 ; 4 Geo. 3, c. 25 ; 21 Geo. 3, c. 60 ; 39 & 40 Geo. 3, c. 28 ; 55 Geo. 3, c. 16 ; 56 Geo. 3, c. 96 ; 7 Geo. 4, c. 46 ; 3 & 4 Will. 4, c. 98 ; 7 & 8 Vict. c. 32.

and in particular, by the 3 & 4 Will. IV. c. 98, it was provided, that after the 1st August, 1834,—unless and until the legislature should otherwise direct,—tender of a Bank of England note (expressed to be payable to bearer on demand) should be a legal tender to the amount therein expressed for all sums above 5*l.*, so long as the Bank continued to pay, on demand, its notes in legal coin ; but, of course, such note would not be a legal tender either by the Bank itself or by any of its branches (*r*). And ultimately, in the year 1844, by the Bank Charter Act of that year (7 & 8 Vict. c. 32), great and extensive changes in the law were introduced (*s*), the statute affecting not only the Bank of England, but all banks whatsoever, and its main object being to place the general circulation of the country upon a sounder footing,—by subjecting to reasonable restraints the issue of paper money ; and by preventing as much as possible those fluctuations in the currency, to which many of our commercial embarrassments have been ascribed ; and we shall state shortly the provisions of this Act.

Firstly, then, as to the BANK OF ENGLAND.—By the Act of 1844 just referred to, the Bank Charter was continued, being again subjected to modifications ; and was made determinable, on giving twelve months' notice pursuant to a vote or resolution in that behalf of the House of Commons, at any time after the 1st August, 1855 (*t*), and on repayment by the government of certain debts particularized in the Act ; and in particular, it was provided, that the issue of Bank of England notes, payable on demand, should thereafter be kept distinct from the general business of the Bank ; and that on the 31st August, 1844, the Bank should transfer to its “*issue department*” securities to the value of 14,000,000*l.* (including the debt due to it by the public), and also so

(*r*) 3 & 4 Will. 4, c. 98, s. 6. s. 11 ; and 19 & 20 Vict. c. 20.

(*s*) See also 17 & 18 Vict. c. 83, (*t*) 7 & 8 Vict. c. 32, s. 27.

much of the gold coin, and gold and silver bullion (*u*), then held by the Bank, as should not be required by its *banking* department; and thereupon, there should be delivered out of the *issue* department into the *banking* department, such an amount of Bank of England notes as, together with those in circulation, should be equal to the aggregate amount of the securities, coin, and bullion so transferred to the *issue* department; and it was further provided, that the whole amount of the Bank's notes in circulation, (including those delivered to the banking department,) should be deemed to be issued on the credit of such securities, coin, and bullion; that the amount of such securities was not to be increased, but might be diminished and again increased, so as not to exceed in the whole the sum of 14,000,000*l.* (*x*); and after such transfer as just mentioned to its issue department, it was made unlawful for the Governor and Company to issue Bank of England notes, either into its banking department, or to any person whatever, save in exchange for other Bank of England notes, or gold coin, or gold or silver bullion, or securities acquired in the issue department under the provisions of the Act. The Act further required, that an

(*u*) The silver bullion is not to exceed one-fourth of the gold coin and bullion (sect. 3).

(*x*) In the year 1857, a great commercial emergency having arisen, so that the Bank was unable to meet its demands for discounts and advances on approved securities without exceeding the limits prescribed by law, the governor and company of the Bank were informed by Government, that it was prepared to propose to parliament a bill to indemnify them from any such excess; and notes were accordingly issued in exchange for securities beyond the amount

limited by law; and parliament afterwards passed an Act (21 & 22 Vict. c. 1) indemnifying the Bank in that respect, and for a short suspension of so much of the Act of 1844 as limited the amount of such securities. A similar crisis had occurred previously in 1847, and occurred again subsequently in the year 1866,—on each of which occasions Government took the same course; but no actual infringement of the law took place on either of these two latter occasions, as the commercial panic subsided before the Bank had made advances in excess of the legal limits.

account of the notes issued by the *issue* department, and of the securities, gold coin, and gold and silver bullion therein, and also of the capital stocks and deposits, money and securities in the *banking* department, should be transmitted weekly to the Board of Inland Revenue in a prescribed form, and be published by it in the London Gazette ; and all persons were declared entitled to demand, from the issue department of the Bank of England, notes in exchange for gold bullion, at the rate of 3*l.* 17*s.* 9*d.* per ounce of standard gold (*y*).

And before leaving the subject of the Bank of England, it should be mentioned, that by the 55 & 56 Vict. c. 48, s. 6,—which section is to be construed as one with the Bank Charter Act, 1844,—the bank's notes issued more than 40 years, and not presented for payment, may be written off as *dead notes*, and treated as if they had never been issued,—so that the Bank is thereby enabled to re-issue notes to the amount so written off ; but the Bank remains liable, on such dead notes, in case they are presented for payment ; and by the seventh section of the same Act, provision is made for the grant of a supplemental charter to the Bank, regulating its internal affairs.

Secondly, as to OTHER BANKS.—The Act of 1844 provided, that in future it should not be lawful for any banker to draw, accept, make, or issue any bill or note, or engagement for the payment of money, payable to bearer on demand ; or to borrow, owe, or take up any money, on his bills or notes payable to bearer on demand (*z*),—subject only to this proviso, namely, that any banker, who on the 6th May, 1844, was carrying on the business of a banker, and was then already lawfully

(*y*) 7 & 8 Vict. c. 32, s. 4 ; and c. 23 ; 17 & 18 Vict. c. 83 ; 33 & (as to stamp duty on Bank of 34 Vict. c. 97 ; 54 & 55 Vict. England notes payable on demand) c. 39.
s. 7 ; and (as to this duty on (*z*) *Att.-Gen. v. Birkbeck*, 12 bankers' notes in general) 9 Geo. 4, Q. B. D. 605.

issuing his own notes, might continue to issue them ; though if he should become bankrupt, or cease to carry on the business, or discontinue the issue of notes, either by agreement with the Bank of England, or otherwise, his privilege in this respect was to be at an end, and incapable of revival (*a*). And as regards any banker continuing to issue his own notes by virtue of this proviso, the Act provided, that he should not thereafter have in circulation a greater amount of notes than the average amount which he had circulated before the Act ; and further, that if any such banker ceased to issue his own notes, it should be lawful for her Majesty in council to authorize the Bank of England to increase the 14,000,000*l.* of securities in its issue department, in the proportion of two-thirds of the amount so withdrawn from circulation (*b*). The Act of 1844, moreover, provided (*c*), that every banker (except the Bank of England) should on the 1st of January in every year, or within fifteen days after, make a return to the Board of Inland Revenue, of the name, residence, and occupation of every member of the partnership, of the name of the firm, and of the place where the business was carried on ; and the board, on or before the 1st of March in every year, is to publish the return in some newspaper circulating in the town or county wherein such banker carries on his business.

Another Act affecting banks (other than the Bank of England) is the Companies Act, 1862 (25 & 26 Vict. c. 89), and which has been amended by subsequent statutes and particularly by the 42 & 43 Vict. c. 76. And by these Acts (in addition to their multifarious provisions regarding companies generally, whether banking companies or other companies) it has been specially provided regarding banks :—That no company or association

(*a*) *Prescott Dimsdale & Co. v. Bank of England*, [1894] 1 Q. B.

(*b*) 7 & 8 Vict. c. 32, s. 5.

(*c*) *Ibid.* s. 21.

consisting of more than ten persons shall carry on the business of banking,—unless it is registered (either as “limited” or as “unlimited”) under the Companies Acts, or unless it has been formed in pursuance of some other Act, or of letters-patent (*d*) ; also, that a banking company registered as “unlimited” may convert itself into a “limited” one, and for that purpose may increase the nominal amount of its capital by increasing the nominal amount of its shares, provided that no part of such increased capital shall be capable of being called up, except in the event and for the purposes of the company being wound up (*e*) ; also, that a “bank of issue” registered as a limited company shall not be entitled to limited liability in respect of *its notes*, but the members shall as to these continue liable as if it had been registered as unlimited ; and in the event of the bank being wound up, if the general assets are insufficient to satisfy the claims of both the note-holders and the general creditors, then the members of the banking company, after satisfying the note-holders, are to be liable to contribute, towards payment of the debts of the general creditors, a sum equal to the amount received by the note-holders out of the general assets of the company, that is to say, out of the funds available for the general creditors as well as for the note-holders (*f*). The Acts have also provided, that, once at the least in every year, the accounts of every banking company registered after the 15th August, 1879, as a limited company, shall be examined by an auditor or auditors (elected annually by the company, and not being either a director or officer of the bank), by whom a report on the accounts, and on all balance-sheets laid before the company in any general meeting, shall be made to the members (*g*).

(*d*) 25 & 26 Vict. c. 89, s. 4.(*f*) 42 & 43 Vict. c. 76, s. 6.(*e*) 42 & 43 Vict. c. 76, s. 5.(*g*) Sect. 7.

Before concluding the subject of Banks, we may refer to the statute 30 & 31 Vict. c. 29, by which it is enacted (sect. 2), that all joint stock banks shall be bound to show their list of shareholders to any registered shareholder ; and (sect. 1) that all contracts for the sale of shares in such banks shall be void, unless the contract sets forth the shares by their distinguishing numbers in the books of the bank, or (failing such distinguishing numbers) then by the name of the registered proprietor or proprietors of the shares. Also, by the Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), repealing the earlier Act on the same subject (39 & 40 Vict. c. 48), it has been provided, in case of banks generally (and including Post Office Savings Banks) (*h*), that a copy of any entry in a banker's book (having been proved to have been examined with the original entry and to be correct) shall, in all legal proceedings, be received as *primâ facie* evidence of such entry, and also of the matters, transactions, and accounts therein recorded (*i*) ; and the court may also, by order, grant any litigant a right to inspect the banking account of any party or person whomsoever, and to make or take copies thereof or extracts therefrom (*k*).

(*h*) 56 & 57 Vict. c. 69, s. 6. 23 Q. B. D. 1 ; *Kissam v. Link*, [1896] 1 Q. B. 574.

(*i*) *Marshfield v. Hutchings*, 32 Ch. Div. 499 ; *Arnott v. Hayes*, 36 Ch. Div. 731 ; *Howard v. Beall*, (*k*) *Ebbsmith's Case*, [1895] 2 Q. B. 669 ; *Pollock v. Garle*, [1898] 1 Ch. 1.

CHAPTER XV.

OF THE LAWS RELATING TO THE REGISTRATION OF BIRTHS
AND DEATHS.

THE registration of births and deaths is either civil or ecclesiastical,—the ecclesiastical registration being much the elder of the two.

I. ECCLESIASTICAL REGISTRATION.—This system is said to be coeval with the *Protestant* Church,—having been first established in the thirtieth year of Henry the Eighth, 1538 (*a*). Various enactments for its confirmation were passed in succeeding reigns; and by a canon (*b*) in the time of James the First (still in force), and by several statutes, particularly the 52 Geo. III. c. 146, further provisions were made for its regulation. The provisions of the 52 Geo. III. c. 146, still remain in force as regards the registration of *baptisms* and *burials* (*c*), although not of *marriages* (*d*); and the Act provides, that registers of public and private baptisms and burials, solemnized according to the rites of the Established Church, in any parish or chapelry in England, shall be made by the rector, vicar, curate, or other officiating minister of the parish, in books of parchment or durable paper; and that in such books there shall be inscribed,—within seven days at the latest after the ceremony (*e*),—such particulars as in the schedule to the Act set forth (*f*); and, where the baptism or burial is solemnized elsewhere than in the

(*a*) Godolph. Abridg. 144.

(*b*) Canon 70, 1 Jac. 1.

(*c*) 6 & 7 Will. 4, c. 86, s. 1.

(*d*) *Vide sup.* vol. II. p. 237.

(*e*) 52 Geo. 3, c. 146, s. 3.

(*f*) Sect. 1.

parish church or churchyard by a clergyman not being the rector, vicar, or curate of the parish, he must transmit on that or the following day a certificate of the solemnization of the ceremony, to the minister of the parish, to be entered among the parish registers (*g*). And the books containing such entries are to be carefully preserved by the officiating minister in a dry well-painted iron chest, and are not to be removed therefrom, except for the purpose of making such entries, or for other the specific purposes authorized by the Act (*h*); and an annual copy of the contents of these register books, certified by the minister, is to be transmitted by the churchwardens, by post, to the registrar of the diocese; and the registrar is bound to make a report to the bishop whether he has duly received such copy or not (*i*); and further, the registrar is required to make out alphabetical lists of the entries; and these lists are to be open to public search, at reasonable times, upon payment of certain fees (*k*).

The statute of George III. extending only, so far as regards burials, to such burials as were solemnized according to the rites of the Established Church, provisions have been since made (*l*) for the registration of such interments as take place in grounds provided under the Burial Acts referred to in a former chapter; and by the 27 & 28 Vict. c. 97, and the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), these or the like provisions have been extended to all burials whatsoever, which take place in any burial ground in England,—the duty of registration (where not otherwise provided for) being thrown on the company, body, or persons to whom the burial-ground belongs; or on the relatives of the deceased. And the register books are directed to be sent from time to time to

(*g*) 52 Geo. 3, c. 146, s. 4.

(*h*) Sect. 5.

(*i*) Sect. 14; 24 & 25 Vict. c. 98,

ss. 36, 37; 27 & 28 Vict. c. 47.

(*k*) 52 Geo. 3, c. 146, s. 12;

Steele v. Williams, 8 Exch. 625.

(*l*) 16 & 17 Vict. c. 134.

the registrar of the diocese ; and any person who knowingly inserts any false entry in these registers or in the certified copies thereof, or who forges any part thereof, or wilfully destroys or injures the same, or knowingly certifies any fraudulent or defective copy, is guilty of felony ; and is liable to penal servitude for life, or not less than five (now three) years ; or to imprisonment, with or without hard labour and solitary confinement, to the extent of two years (*m*).

II. CIVIL REGISTRATION.—It was found that, under the ecclesiastical method of registering baptisms and burials, the entries were often incomplete and inaccurate, and also otherwise inadequate,—for they extended only to such births and deaths as were afterwards attended with the proper ceremonies of the Church. Accordingly, as from the year 1836—1837, and in consequence of the report of a committee of the House of Commons appointed in 1833, to consider the general state of parochial registers and the laws relating thereto, a new system of registering births and deaths, wholly independent of (but co-existent with) the ecclesiastical method of registering baptisms and burials, was introduced by the 6 & 7 Will. IV. c. 86. And by that Act, registration districts were established, and registrars therefor appointed ; and various provisions were enacted, as regards the duties of these officers in registering births and deaths ; but the provisions now in force as regards these duties are mostly contained in the Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), which repealed the earlier Acts so far as they bore on this matter (*n*).

It is to be understood, then, that under the combined effect of the 6 & 7 Will. IV. c. 86, and the subsequent

(*m*) 24 & 25 Vict. c. 98, ss. 36, 37 ; 27 & 28 Vict. c. 47 ; 54 & 55 Vict. c. 69.

(*n*) 6 & 7 Will. 4, c. 86 ; 7 Will. 4 and 1 Vict. c. 22 ; 17 & 18 Vict. c. 104 ; 18 & 19 Vict. c. 119 ; and 21 & 22 Vict. c. 25.

Registration Acts, every poor law union or parish is divided into registration districts (*o*) ; each of which is called by a distinct name, and possesses a *Registrar* (*p*) ; and he must be either resident or have a known office therein (*q*) ; and he may in general act by *deputy* (*r*). The Registrars of each union are subjected to the supervision of their "Superintendent Registrar,"—an office to be filled as of right, (in case of his due qualification and acceptance,) by the clerk to the guardians of the union, during the pleasure of the Registrar-General (*s*),—the Registrar-General being an officer appointed under the Great Seal, and holding office during the pleasure of the crown (*t*), and exercising authority over all Superintendent Registrars ; and in fact, it is to him that (subject only to such regulations as may be made by a principal secretary of state) (*u*), the management of the whole system of this registration (where no specific directions are given by the Acts) is entrusted. Provision is also made for the establishment of a proper office, to be called the "General Register Office," and of register offices for each union (to be placed under the respective Superintendents) ; and for the preservation and safe custody of the registers when collected (*x*) ;—and the Acts also contain regulations as to the uniform construction and durable materials of the *books* wherein the entries are to be made (*y*).

The practical working out of the system depends mainly upon the *Registrars*, who have the following duties to perform :—

- | | |
|---|---|
| (<i>o</i>) 37 & 38 Vict. c. 88, s. 21. | (<i>t</i>) 6 & 7 Will. 4, c. 86, s. 2 ; and |
| (<i>p</i>) 6 & 7 Will. 4, c. 86, ss. 7, | (as to the registration of the births |
| 10, 11 ; 29 & 30 Vict. c. 113, s. 1. | and deaths occurring among officers |
| (<i>q</i>) 6 & 7 Will. 4, c. 86, s. 26. | and soldiers of her Majesty's land |
| (<i>r</i>) <i>Ibid.</i> s. 29. | forces out of the United Kingdom) |
| (<i>s</i>) 6 & 7 Will. 4, c. 86, ss. 7, | 42 & 43 Vict. c. 8. |
| 10, 11 ; 29 & 30 Vict. c. 113, s. 1 ; | (<i>u</i>) 6 & 7 Will. 4, c. 86, s. 5. |
| 51 & 52 Vict. c. 41, s. 24, sub- | (<i>x</i>) Sect. 9. |
| s. (2) (d). | (<i>y</i>) Sect. 17. |

Firstly, as to BIRTHS.—Every registrar is authorized and required to inform himself carefully of every birth which shall happen in his district ; and to learn and register, as soon after the event as may conveniently be done, such particulars as are required, by the schedule annexed to the 37 & 38 Vict. c. 88, to be registered touching such birth (*z*) ; and it is the duty of the father and mother of any child born alive,—or, in their default, of the occupier of the house (if he knows of the birth), and of each person present thereat, and of the person having charge of the child—within forty-two days after the day of such birth, to give to the proper registrar information of the particulars required to be registered concerning such birth ; and, in his presence, to sign the register (*a*). When a period of three months from the birth of the child has expired, registration may indeed still take place ; only, in that case, a solemn declaration before the Superintendent Registrar as to the truth of the particulars required must be made by one of the persons on whom the statute imposes the duty of giving the information as to the birth ; and he or she must sign the register in the presence both of the Superintendent Registrar and of the registrar of the district (*b*) ; but after the expiration of twelve months from the time of the birth, no registry thereof can, in the general case, be made,—except with the written authority of the Registrar-General, such authority being duly entered on the register (*c*). But births on board a vessel at sea are, of course, exempt from these specific provisions (*d*).

Secondly, As to DEATHS.—It is the duty of every Registrar to inform himself carefully of every death which

(*z*) 37 & 38 Vict. c. 88, ss. 4, 18 ;

In re Wittle, Law Rep., 9 Eq. Ca.
373.

(*a*) 37 & 38 Vict. c. 88, s. 1 ;

R. v. Price, 11 Ad. & El. 727.

(*b*) Sect. 5.

(*c*) *Ibid*.

(*d*) Sect. 37.

happens in his sub-district: and to register such particulars concerning the same as are specified in the schedule annexed to the 37 & 38 Vict. c. 88 (*e*) ; and it is the duty of the nearest relatives of the deceased, present at the death or in attendance during his last illness,—and, in default of such relatives, of any other relative in the same sub-district ; and in default of any such persons present at the death, of the occupier of the house (if he knows of such death having taken place) ; and, in his default, of each inmate of the house, and of the person causing the body to be buried,—to give to the registrar information (within the five days next following the day of death), according to the best of his knowledge and belief, of such particulars as are required to be registered touching the death (*f*) ; and in the case of an inquest upon the body, such information is to be conveyed to the registrar, by the coroner before whom such inquest is held (*g*).

And four times in every year, each district registrar is to deliver, to his Superintendent, a certified copy of the entries made by him in his registry book,—and finally the register itself, upon the book being filled ; and the Superintendent, at the same intervals, is to transmit the same to the Registrar-General (*h*). And the duties of this last-mentioned officer, into whose hands the documents thus ultimately fall, consist,—in addition to the general supervision of the working of the whole system,—in examining, arranging, and indexing the certified copies so sent ; and he also compiles abstracts of their contents, and transmits the same, once in every year, to a principal secretary of state ; by whom such abstracts are afterwards laid before parliament (*i*).

And before we conclude this chapter, we may remark, that at the time of the introduction of the system of *civil*

(*e*) 37 & 38 Vict. c. 88, s. 18.

(*f*) Sect. 10.

(*g*) Sect. 16.

(*h*) 6 & 7 Will. 4, c. 86, ss. 32,

34.

(*i*) Sect. 6.

registration above explained, certain commissioners were appointed for inquiring into the state and authenticity of any registers (*other* than parochial) which at that time existed ; and they succeeded, in the course of a few years, in discovering about 7,000 such registers which were deemed authentic ; and the documents so discovered were, by 3 & 4 Vict. c. 92, placed under the care of the Registrar-General, together with the records of marriages and baptisms theretofore solemnized in the Fleet and King's Bench prisons, and at other irregular places ; and by an express provision of the Act, all registers and records deposited in the General Register Office by virtue of the Act (except such registers as are in the Act expressly excepted) of marriages and baptisms at the Fleet and elsewhere,—are deemed to be in legal custody, and receivable in evidence accordingly in all courts of justice (*k*).

(*k*) 3 & 4 Vict. c. 92, s. 6 ; 21 & 22 Vict. c. 25, s. 3.

BOOK V.

OF CIVIL INJURIES.

CHAPTER I.

OF THE REDRESS OF INJURIES (I.) BY THE MERE ACT OF THE PARTIES ; AND (II.) BY THE MERE ACT (OR OPERATION) OF THE LAW.

WE now proceed to the examination of *wrongs*, an inquiry evidently posterior in its nature to the inquiry into *rights* (a) ; and wrongs being of two sorts,—*civil injuries* and *crimes*,—we shall in this present Book consider only the first of these species of wrongs, with their appropriate remedies, reserving till the sixth and concluding Book the consideration of the other class of wrongs.

The remedies for civil injuries are principally to be obtained by application to the courts of justice, *i.e.*, by *action* or *suit* ; but there being certain injuries which require a more speedy remedy than can be had by action or suit, certain extra-judicial or eccentric remedies are provided ; and of these latter we shall first treat, before we consider the remedy by action.

And, Firstly, we have to consider *Redress by the Mere Act of the Parties* ; and, Secondly, *Redress* (or Relief) *by the Mere Act* (or Operation) *of the Law* : and there fall

(a) 3 Bl. Com. 2.

to be considered under the first of these two divisions the following varieties of redress, namely,—(1) Self-defence ; (2) Recaption or Reprisal ; (3) Entry ; (4) Abatement ; (5) Distress ; and (6) the Seizure of Heriots ; and to these may be added (although of a somewhat dissimilar character), (7) Redress by Accord and Satisfaction ; and (8) Redress by Arbitration. And there fall to be considered under the second division (*viz.*, Redress by the Mere Act of the Law) the two following varieties, *viz.*, (1) Retainer ; and (2) Remitter.

I. Firstly, REDRESS BY THE MERE ACT OF THE PARTIES :

(1) SELF-DEFENCE, that is to say, the *defence* of one's self, or the mutual and reciprocal *defence* of people who stand in the relation of husband and wife, or of parent and child, or of master and servant.—If a man be forcibly attacked in his person or property, it is lawful for him to repel force by force, any breach of the peace which may ensue being chargeable upon him only who began the affray (*b*) ; and the law only requires that no more force be used than is necessary,—for if the resistance exceed the bounds of moderation (*i.e.*, of mere defence), then the defender himself becomes the aggressor (*c*). And what a man may do in his own defence, he may also do in defence of his wife, or of his child, or of his servant ; also, a child may defend his parent, and a servant his master ; and, *semble*, a wife her husband.

(2) RECAPTION OR REPRISAL.—This mode of redress may be resorted to when any one deprives another of his property in goods, or wrongfully detains his wife, child, or servant,—in all which cases, the owner of the goods, or

(*b*) 2 Roll. Abr. 546 ; 1 Hawk.

P. C. 131 ; Bac. Abr. Master and
Servant (P).

(*c*) 1 Hale, P. C. 485, 486. *Vide*

post, bk. VI. c. IV.

the husband, parent, or master, may lawfully retake them, wherever he happens to find them,—retaking them peaceably, and not in a riotous manner, or with unnecessary violence, or so as to occasion a breach of the peace (*d*). If, for instance, my horse is wrongfully taken away, and I find him on a common, or in a fair, or at a public inn, I may lawfully retake him into my possession ; but if he is in a private stable, or in private grounds, I may not break open the stable or break into the private grounds to take him out, my only remedy in such latter case being an action to recover the animal or his value, together with damages for the detention (*e*).

(3) ENTRY.—[This is the remedy given to the party himself, for an injury to his *real* property, where the injury consists in his dispossession of the property by another person without any right to the possession thereof. In such a case, the party entitled may make a formal but peaceable entry on the lands, declaring that thereby he re-takes the possession,—which notorious act of ownership is equivalent to the old feudal investiture by the lord ; and he may enter on part of the property, in the name of the whole ; but if the estate lies in different counties, he must make different entries,—for the notoriety of an entry to the freeholders of Westmoreland, is not any notoriety to the freeholders of Sussex (*f*). Also, if there be two disseisors, the party disseised must make his entry on both ; or if one disseisor has conveyed the lands with livery to two distinct feoffees, entry must be made on both (*g*),—for as their seisin is distinct, so also must be the act which divests that seisin. Also, the remedy by entry

(*d*) *Blades v. Higgs*, 10 C. B. C. B. 730 ; 17 & 18 Vict. c. 125, (N.S.) 713. s. 78.

(*e*) *Higgins v. Andrews*, 2 Roll. R. 55, 56 ; *Masters and Powlie's Case*, *ib.* 208 ; 2 Roll. Abr. 565, 566 ; *Chilton v. Carrington*, 15

(*f*) Co. Litt. 252_b ; 3 Bl. Com. 175.

(*g*) Co. Litt. 252.

[must be pursued in a peaceable manner, and not with force or a strong hand (*h*),—a forcible entry being an indictable offence (*i*) ; for, if one turns another (although wrongfully in possession) out of his possession forcibly, this amounts to a breach of the peace and is punishable accordingly (*k*).

(4) ABATEMENT.—A fourth species of remedy by the mere act of the party injured, is when he *abates*, that is, removes, a nuisance ; and, in general, every nuisance may be abated by the party aggrieved thereby, provided he commit no riot in the abating of it (*l*), nor occasion any damage, beyond what the abatement necessarily requires (*m*). Thus, if a house or wall is erected by my neighbour, so near to mine that it stops my antient lights, I may enter his land and peaceably pull it down (*n*) ; and if the boughs of his trees are allowed to grow so as to overhang my land, I may, on his refusal (or neglect) to remove such part of them as are in that position, peaceably effect the removal myself (*o*) ; also, if a new gate be erected across a public highway, any person passing that way may cut it down and destroy it (*p*).

(5) DISTRESS.—A fifth way in which the law allows a man to minister redress to himself, is by allowing him to *distrain* the goods of another for the non-payment of rent, or to distrain cattle *damage feasant* (that is, doing damage

(*h*) *Newton v. Harland*, 1 Man. & G. 644; *Harvey v. Bridges*, 14 Mee. & W. 442.

(*i*) *Beddall v. Maitland*, 17 Ch. D. 174; *Edwick v. Hawkes*, 18 Ch. D. 199.

(*k*) 5 Ric. 2, st. 1, c. 7; 15 Ric. 2, c. 2; and 31 Eliz. c. 11; 4 Inst. 176; 21 Jac. 1, c. 15; *R. v. Wilson*, 3 Ad. & Ell. 811; *R. v. Harland*, *ib.* 826; *Lows v. Telford*, 1 App. Ca. 414.

(*l*) 2 Rep. 101; 9 Rep. 55; *Houghton v. Butler*, 4 T. R. 364.

(*m*) *Cooper v. Marshall*, 1 Burr. 261; *Lodie v. Arnold*, 2 Salk. 458.

(*n*) *R. v. Rosewell*, 2 Salk. 459.

(*o*) *Norris v. Baker*, 1 Roll. Rep. 394; *Lodie v. Arnold*, 2 Salk. 458; *Lemmon v. Webb*, [1894] 3 Ch. 1; [1895] A. C. 1.

(*p*) *James v. Hayward*, Cro. Car. 184.

[to, or trespassing upon, his land); and as the law of distress is a subject of great use and consequence, it shall here be considered with some minuteness, by inquiring, first, for what injuries a distress may be taken; secondly, what things may be distrained; and thirdly, the manner of taking, disposing of, and avoiding distresses.

Firstly, the injuries for which a distress may be taken.—The most usual injury is the non-payment of rent; and the right of distress being incident, by the common law, to every *rent service*,—and, by particular reservation, to *rent charges* also,—and the same remedy having been extended by the 4 Geo. II. c. 28 to *rents seck*, *rents of assize*, and *chief rents* (*q*), a distress may now be taken for any kind of rent in arrear, the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it (*r*);] and a distress may be taken also for any apportioned part of a rent (*s*). But as it is of the definition of rent, that its amount shall be certain,—or at the least be capable of being reduced to a certainty,—where the sum to be paid by the occupier is not fixed by agreement, but depends on what shall be considered as a reasonable compensation for the use and occupation of the premises, no distress for it can legally be made (*t*). Also, the rent must be in arrear before any distress for it may be taken; and it is not in arrear until the day after the day fixed for its payment; but the rent may, of course, be made payable in advance, although usually it is payable at the end of the period for which it is due.

[Another injury, for which distresses may be taken, is where a man finds a stranger's beasts wandering in his

(*q*) *Vide sup.* vol. I. pp. 477, 481.

(*s*) *Rivis v. Watson*, 5 Mee. & W. 255.

(*r*) *Bradbury v. Wright*, 2 Doug. 624; *Newman v. Anderton*, 2 N. R. 224; *Giles v. Spencer*, 3 C. B. (N.S.) 244; *Buttery v. Robinson*, 3 Bing. 392.

(*t*) *Regnart v. Porter*, 7 Bing. 451; *Warner v. Pochett*, 3 B. & Adol. 928; *Dunk v. Hunter*, 5 B. & Ald. 322.

[grounds *damage feasant*,—in which case, supposing the trespass not to be rendered excusable by the defective state of his own fences, or the like (*u*), the owner of the soil may distrain them, while they so remain on his grounds, till satisfaction be made him for the injury he has thereby sustained;] and apparently, if he so distrain, he cannot, while he holds the distress, also sue for the damage (*x*); and it is said, that this remedy by distress extends also to inanimate things doing damage (*y*).

There are, also, other kinds of distresses introduced, in special cases, for the recovery of duties and penalties imposed by Act of Parliament (*z*); and there is also a right of distress for a neglect to do suit in the lord's court, or to pay amercements legally imposed by a court leet or court baron (*a*).

Secondly: The things which may be taken in distress.—[In general, all chattels personal, unless particularly protected or exempted, may be taken in distress; and instead, therefore, of mentioning what things are distrainable, it will be easier to enumerate those which are exempted, with the reason of the exemption (*b*). And, 1. Articles and things which were formerly considered as having no intrinsic value, or wherein a man could have no absolute property, (as dogs, cats, rabbits, and the like, and all animals *feræ naturæ*,) are exempted from distress; but if deer are kept in a private inclosure for the purpose of sale or profit, this so far changes their nature, by reducing

(*u*) 2 Wms. Saund. 284 e, n. (4).

(*x*) *Boden v. Roscoe*, [1894] 1 Q. B. 608.

(*y*) *Ambergate, &c. Railway Company v. Midland Railway Company*, 2 Ell. & Bl. 793.

(*z*) For example, for the assessments made by the commissioners of sewers (7 Ann. c. 33; 24 & 25 Vict. c. 133, s. 38); and for

poor rates (43 Eliz. c. 2; 17 Geo. 2, c. 38, s. 7; 4 & 5 Will. 4, c. 76, s. 49; *In re Elizabeth Allen*, [1894] 2 Q. B. 924).

(*a*) Co. Litt. 96; 2 Wms. Saund. 168, n. (1); Bro. Abr. in tit. Distresses, 15; Scriven on Copyholds, 7th ed., by Brown, pp. 446, 447.

(*b*) Co. Litt. 47.

[them to a kind of stock or merchandize, that they may be distrained for rent (c). 2. Whatever is in the personal use or occupation of any man, is for the time privileged from distress, in order to prevent the danger, which might otherwise arise, of a breach of the peace (d) ; as, for example, an axe with which a man is cutting wood, or a horse while a man is riding him. 3. Things delivered to a person following a public trade, to be carried, wrought, or managed in the way of such his trade, are (for the benefit of trade) exempted from distress (e) ; as a horse sent to a smith to be shoed, or standing in a common inn ; or cloth in a tailor's house (f) ; or corn sent to a mill or market ; or goods sent to an auctioneer to be sold (g) ;] but with these exceptions, all goods and chattels found upon the premises, *whether they in fact belong to the tenant or to a stranger*, are distrainable by the landlord for rent (h), subject (as regards the beasts, or sheep and cattle, of a stranger) to the temporary protection to be presently mentioned, and subject (as regards lodgers' goods) to the qualified protection given by the 34 & 35 Vict. c. 79,—that is to say : By the 34 & 35 Vict. c. 79, it has been provided, that a lodger, whose goods and chattels have been distrained for rent, may serve the distraining landlord (or his bailiff) with a written declaration stating that his (the lodger's) landlord has no right of property or beneficial interest in the goods and chattels in question, but that they are the

(c) *Davies v. Powel*, C. B. Hil. 11 Geo. 2 ; *Willes*, 47.

(d) *Storey v. Robinson*, 6 T. R. 138 ; *Field v. Adames*, 12 Ad. & El. 649.

(e) *Simpson v. Hartopp*, *Willes*, 512 ; *Gisbourn v. Hurst*, 1 Salk. 250 ; *Muspratt v. Gregory*, 3 Mee. & W. 677 ; *Joule v. Jackson*, 7 Mee. & W. 454 ; *Gibson v. Ireson*, 3 Q. B. 39 ; *Finden v. M'Laren*,

6 Q. B. 891 ; *Miles v. Furber*, *Law Rep.*, 8 Q. B. 77.

(f) *Read v. Burley*, *Cro. Eliz.* 549.

(g) *Williams v. Holmes*, 8 Exch. 861 ; *Lyons v. Elliott*, 1 Q. B. D. 210.

(h) *Francis v. Wyatt*, 3 Burr. 1498 ; *Crosier v. Tomkinson*, 2 Kent, 439 ; *Parsons v. Gingell*, 4 C. B. 545.

property or in the lawful possession of the lodger, and also stating that nothing or only a specified amount is due by the lodger to his landlord for rent ; and along with such declaration he may pay or tender the rent (if any) so stated to be due by him; and after such declaration (and payment or tender), if the distraining landlord (or his bailiff) proceeds with the distress, he is deemed guilty of an illegal distress, and the goods may be recovered by the lodger on the order of two justices or of a stipendiary magistrate (*i*). And with reference to the *beasts* of a stranger found on the tenant's land, although, if they are put in by consent of the owner of the beasts, they are, by the common law, immediately distrainable for rent in arrear, as they also are if they break the fences to come on the land (*k*), yet [if the lands are not sufficiently fenced so as to keep out cattle, the beasts are exempted from distress, unless and until they have been *levant* and *couchant* (*levantes et cubantes*) on the land, that is, have been long enough there to have lain down and risen up to feed,—which in general is held to be one night at least,—after which the law presumes that the owner has had notice that his cattle have strayed, and it is then his own negligence not to take them away (*l*). And yet, even where the beasts have been *levant* and *couchant*, if the obligation to repair the fences lies on the landlord or on his tenant, the beasts are not distrainable till actual notice has been given to the owner that they are there, and he neglects after such notice to remove them (*m*),—for the law will not suffer the landlord to take advantage of his own or his tenant's wrong (*n*). 4. Things in the custody of the law, as where they have been already taken

(*i*) *Phillips v. Henson*, 3 C. P. D. 26 ; *Sharp v. Fowle*, 12 Q. B. D. 385 ; *Heawood v. Bone*, 13 Q. B. D. 179.

(*k*) Co. Litt. 47.

(*l*) Gilb. Dist., by Hunt, 3rd ed. 47.

(*m*) *Hemp v. Crewes*, 2 Lutw. 1580.

(*n*) *Poole v. Longueville*, 2 Saund. 289.

[on a distress or in execution, are not distrainable (*o*) ; but as regards an execution, it is only good subject to providing for the rent in arrear (not exceeding one year's arrears) (*p*), or (when a bankruptcy is imminent) for half a year's arrears (*q*) ; and any growing crops seized and sold on an execution, so long as they remain on the lands, are, in default of other sufficient distress, liable to be distrained upon for rent becoming due after the seizure and sale (*r*) ;] and where the execution is under the warrant of a county court, the landlord's claim for rent must also be provided for (*s*). [5. Money is not distrainable, unless it has been placed in a *sealed bag* (*t*). 6. Nothing shall be distrained for rent, which may not be rendered again in as good plight as when it was distrained (*u*),—for which reason, milk, fruit, and the like cannot be distrained ; also, sheaves or shocks of corn could not at one time have been distrained, because some damage must needs accrue in their removal,—though a cart loaded with corn might be distrained, as that could be safely restored ; but now, by the 2 W. & M. c. 5, corn as soon as it is reaped, and also hay, may be distrained, as freely as other chattels (*x*). 7. Fixtures, or things fixed to the freehold,—as caldrons, windows, doors, and chimney-pieces,—may not in general be distrained, for they savour of the realty (*y*) ; also, trees and shrubs in a nursery (*z*) ;

(*o*) Co. Litt. 47 a ; *Smith v. Russell*, 3 Taunt. 400 ; *Wright v. Dewes*, 1 Ad. & Ell. 641. See also 56 Geo. 3, c. 50, s. 6.

(*p*) 8 Anne, c. 18 ; 7 & 8 Vict. c. 96, s. 67.

(*q*) 53 & 54 Vict. c. 71, s. 28, amending 46 & 47 Vict. c. 52, s. 42.

(*r*) 14 & 15 Vict. c. 25, s. 2.

(*s*) 51 & 52 Vict. c. 43, s. 160.

(*t*) 1 Roll. Ab. 667 ; Vin. Abr. Dist. (H.) ; *Wilson v. Duckett*, 2 Mod. 61.

(*u*) *Darby v. Harris*, 1 Q. B. 895 ; *Morley v. Pincombe*, 2 Exch. 101.

(*x*) *Johnson v. Faulkner*, 2 Q. B. 925 ; *Hawkins v. Walrond*, 1 C. P. D. 280.

(*y*) *Niblett v. Smith*, 4 T. R. 504 ; *Dalton v. Whitten*, 3 Q. B. 961 ; *Darby v. Harris*, 1 Q. B. 895 ; *Hellawell v. Eastwood*, 6 Exch. 295 ; *Turner v. Cameron*, Law Rep., 5 Q. B. 306.

(*z*) *Clark v. Gaskarth*, 8 Taunt. 431.

[and growing corn could not be distrained, till the 11 Geo. II. c. 19 empowered landlords to distrain any corn or other products of the earth while still growing, and to cut and gather them when ripe (*a*).] 8. By the Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), wagons, trucks, carriages of all kinds, and locomotive engines used on railways, while at work in or on any colliery, quarry, mine, manufactory, warehouse, wharf, pier, or jetty in or on which there is any railway siding,—if bearing a proper metal plate or mark indicating the actual owner thereof,—are prohibited from being distrained for rent payable by the tenant of such colliery or other work. 9. By the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 4, all goods and chattels of a tenant or his family are exempt from distress, if and so far as they would be protected from seizure in execution under sect. 96 of the County Courts Act, 1846, (now sect. 147 of the County Courts Act, 1888,) that is to say, the wearing apparel and bedding of the tenant and his family, and the tools and implements of the tenant's trade not exceeding 5*l.* in value; and if any of these last-mentioned exempted articles are (contrary to the Act) distrained upon, there will be a summary order for their restoration, or (in case they have been already sold) for the payment of their value (*b*). And there is a similar provision in the Summary Jurisdiction Act, 1879, s. 29.

[Besides the preceding articles, which are *absolutely* privileged, there are others which are privileged *sub modo*,—that is to say, beasts of the plough (*averia caruæ*), and sheep, and instruments of husbandry; and also the instruments of a man's trade or profession,—as the axe of a carpenter, the books of a scholar, and the like (*c*); for as to all of these, the rule is, that they are exempt from distress, *provided there be other sufficient distress on the*

(*a*) *Miller v. Green*, 8 Bing. 92.

(*b*) 58 & 59 Vict. c. 24, s. 4.

(*c*) *Nargett v. Nias*, 1 E. & E.

[*premises, but not otherwise (d) ;*] and, by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 45, live stock belonging to another person, and taken in by the tenant of any holding to which the Act applies to be fed at a fair price (that is to say, cattle that are agisted) (*e*), is not to be distrained for rent, *when there is other sufficient distress to be found* ; and when there is no other sufficient distress, such live stock may be distrained, *but only to the extent of the price for the agistment thereof that then remains due*, and may be redeemed by the true owner thereof upon payment of such price (*f*) ; and by virtue of the same Act, agricultural machinery belonging to another person, and *bonâ fide* hired to the tenant, is exempted from distress, as likewise is all live stock of another person which is on the land solely for breeding purposes.

Thirdly, let us next consider how distresses may be taken, disposed of, or avoided. And [as regards the manner of disposing of distresses, although distresses were formerly looked upon in no other light than as a mere pledge, yet distresses for *rent* being found by the legislature to be an effectual method of compelling the payment of the rent, many beneficial enactments have, from time to time, been made for allowing the things taken to be *sold* ;] and with regard also to distresses of beasts which have been impounded, these also may now, under the provisions of "Martin's Act," (17 & 18 Vict. c. 60,) amending 5 & 6 Will. IV. c. 59, and 12 & 13 Vict. c. 92, be sold after seven days, and the proceeds appropriated to repay the impounder double the value of the food he has provided and the expenses,—the overplus, if any, being rendered to the owner.

(*d*) Co. Litt. 47 a ; 2 Inst. 132 ;
Gorton v. Faulkner, 4 T. R. 565 ;
Hutchins v. Chambers, 1 Burr. 589 ;
Piggott v. Birtles, 1 Mee. & W.
 441 ; *Keen v. Priest*, 4 H. & N.
 236.

(*e*) *Masters v. Green*, 20 Q. B. D.
 807.

(*f*) *London and Yorkshire Bank
 v. Belton*, 15 Q. B. D. 457, where
 the price of the agistment was
 "milk for meat."

[In pointing out the methods of distraining, we shall in general suppose the distress to be made for rent, only remarking (where necessary) the difference between such a distress and one taken for any other cause.

In the first place, then, all distresses must be made *by day*,—unless in the case of *damage feasant* (*g*), an exception being there allowed, lest the beasts should escape before they are taken (*h*). And when a landlord intends to make a distress he must, by himself or his bailiff (being a bailiff duly certificated by the county court) (*i*), make entry on the demised premises : and this formerly must have been during the continuance of the lease ; but now, (by the 8 Ann. c. 18,) if the tenant holds over, the landlord may distrain within six months after the determination of the lease,—provided his own title or interest, as well as the tenant's possession, continue at the time of the distress (*k*).] If the lessor does not find sufficient distress on the premises, he could, as the law once stood, resort nowhere else; and therefore tenants, who were knavish, made a practice to convey away their goods and stock, fraudulently, from the house or lands demised, in order to cheat their landlords ; and, under the present law, the distress, as a general rule, must still be on the premises demised (*l*); but by the common law, a landlord may distrain, for rent service, the beasts of his tenant feeding upon any commons or wastes appendant or appurtenant to the demised premises (*m*); and, by the 8 Ann. c. 18, and 11 Geo. II. c. 19, a landlord may now, as regards any goods of his tenant, carried off the premises *fraudulently or clandestinely*, distrain them wherever he finds them, doing so within thirty days after the removal, provided they have not been

(*g*) 7 Rep. 7 a.

(*h*) Co. Litt. 142.

(*i*) 51 & 52 Vict. c. 21, s. 7;
58 & 59 Vict. c. 24, ss. 1, 2.

(*k*) *Taylerson v. Peters*, 7 A. & E. 110.

(*l*) *Buszard v. Capel*, 8 Barn. & Cress. 141.

(*m*) *Miller v. Green*, 8 Bing. 92.

meanwhile *bonâ fide* sold for a valuable consideration ; and all persons privy to, or assisting in, such fraudulent conveyance away, forfeit double the value of the goods to the landlord (*n*). It is to be noticed, that the landlord, in order to distrain, may not break open his tenant's house, for that is a breach of the peace (*o*) ; but when he is once in the house, he may break open an inner door ; and if goods have been fraudulently removed from the premises and locked up to prevent a distress, he may, with the assistance of a police officer, break open, in the day time, any place whither they have been so removed,—oath being first made to a justice, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein (*p*).

[Where a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once ; and not for part at one time and part at another (*q*) ; but if he distrain for the whole, and there be not sufficient on the premises, or if he happen to mistake the value of the thing distrained, and so take an insufficient distress, he may take a second distress to complete his remedy (*r*).

Distresses must be proportioned to the rent in arrear ; and by the Statute of Marlbridge, (52 Hen. III. c. 4,) if any man take a great or unreasonable distress, he shall be heavily amerced for the same. Thus, if the landlord distrain two oxen for twelve pence rent, the taking of *both* is an unreasonable distress ; but if there were no other distress nearer the value to be found, he might reasonably have distrained *one* of them (*s*). And for homage or

(*n*) *Angell v. Harrison*, 17 L. J. Q. B. 25 ; *Dibble v. Bowater*, 2 Ell. Bl. 564.

(*o*) Co. Litt. 161 ; *Eldridge v. Stacey*, 15 C. B. (N.S.) 458 ; *Nash v. Lucas*, Law Rep., 2 Q. B. 590.

(*p*) 11 Geo. 2, c. 18 ; *American*

Meat Co. v. Hendry, W. N. (1893), pp. 67, 82.

(*q*) 2 Lutw. 1532 ; *Lee v. Cooke*, 3 H. & N. 205.

(*r*) Cro. Eliz. 13 ; stat. 17 Car. 2, c. 7 ; *Hutchins v. Chambers*, 1 Burr. 590.

(*s*) 2 Inst. 107.

[fealty, or suit and service, it is said that no distress can be excessive (*t*),—for as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again; and this distress for suit and service is the *distress infinite* which is referred to in the books (*u*). The remedy for excessive distress is by a special action grounded on the Statute of Marlbridge, the ordinary action of trespass not being maintainable upon this account,—for an excessive distress is no injury at the common law (*x*).

When the distress is thus taken, the next consideration is the disposal of it; and for that purpose, the things distrained must in the first place be impounded, and until impounded, they may be *rescued* by the owner; but if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out,—for they are then in the custody of the law (*y*); and by the 2 W. & M. c. 5, an action for treble damages will lie for illegally taking out of pound a distress for *rent*; and by the 6 & 7 Vict. c. 30, if any person shall release or attempt to release cattle lawfully seized (as *damage feasant*) by way of distress, from the place where they are impounded, *or on the way to or from such place*, or shall destroy the pound, or any part thereof,—he shall, on conviction before two justices of the peace, be liable to a penalty not exceeding 5*l.*, and to payment of the reasonable charges and expenses, and (in default) may be committed to the house of correction, with hard labour, for not more than three calendar months nor less than fourteen days. Also, by the 1 & 2 P. & M. c. 12, no distress of cattle can be driven out of the hundred where it is taken, unless to a pound overt (*z*) within the

(*t*) Bro. Abr. tit. Assize, 291, Prerogative, 98.

(*u*) 3 Bl. Com. p. 231; Scriven on Copyholds, 7th ed., by Brown, pp. 238, 239.

(*x*) 1 Ventr. 104; Fitzgib. 85; *Fisher v. Algar*, 2 C. & P. 374;

Hutchins v. Chambers, 1 Burr. 590; *Roden v. Eyton*, 4 C. B. 427; *Tancred v. Leyland*, 16 Q. B. 669; *Glynn v. Thomas*, 11 Exch. 870.

(*y*) Co. Litt. 47, 160, 161.

(*z*) A pound open overhead is a pound overt, as distinguished from

[same shire, and within three miles of the place where it was taken,—which provision is for the benefit of the tenants, that they may know where to find and replevy the distress; but by the 11 Geo. II. c. 19, a person distraining cattle for rent may turn any part of the premises, upon which the distress is taken, into a pound *pro hac vice*, for securing of such distress (*a*).] If animals be impounded, the onus of their support is on the distrainor, the 12 & 13 Vict. c. 92, ss. 5, 6, requiring him to supply them with sufficient food and water, under a penalty of twenty shillings, for every refusal or neglect, to be adjudged by a justice in a summary way; but he is entitled, of course, to recover his outlay for food and water; and by the 17 & 18 Vict. c. 60, he may recover even double the value of the food supplied as well as the other expenses (*b*). Moreover, a [distress of household goods, or other dead chattels, which are liable to be stolen, or damaged by weather, ought to be impounded in a pound covert; else the distrainor must answer for the consequences (*c*).

The goods when impounded having been formerly only in the nature of a pledge, on that account it was held, that the distrainor was not at liberty to work or use a distrained beast (*d*); but he might milk cows taken in distress, for that was for the benefit of the owner (*e*); and thus the law still continues with regard to distresses for suit or service,—for these must remain impounded till the owner makes satisfaction; or until he contests the right

a pound *covert* (or pound covered in).

(*a*) *Washborn v. Black*, 11 East, 504, n. (*a*); *Pitt v. Shew*, 4 B. & Ald. 208; *Swann v. Earl Falmouth*, 8 Barn. & Cress. 456; *Woods v. Durrant*, 16 Mee. & W. 149; *Johnson v. Upham*, 2 Ell. & Ell. 250; *Tennant v. Field*, 8 Ell. & Bl. 336.

(*b*) *Dargan v. Davies*, 2 Q. B. D. 118.

(*c*) *Mason v. Newland*, 9 C. & P. 575; *Wilder v. Speer*, 8 A. & E. 547; *Bignell v. Clarke*, 5 H. & N. 485.

(*d*) *Smith v. Wright*, 6 H. & N. 821.

(*e*) *Bagshawe v. Goward*, Cro. Jac. 148.

[of distraining, by replevying the chattels, a proceeding of which we shall presently say more. The distress therefore in these cases, though it puts the owner to inconvenience, and is consequently a punishment to him, yet if he continues obstinate, and will make no satisfaction or payment, is no remedy at all to the distrainor. But for a debt due to the crown, unless paid within forty days, the distress was always saleable even at the common law (*f*); and afterwards it was expressly provided by several Acts of Parliament (*g*), that in all cases of distress for rent, if the owner did not, within *five days* after the distress was taken, and notice of the cause thereof given him, replevy the same with sufficient security, the distress might be appraised by two appraisers, and sold towards satisfaction of the rent and charges (*h*),—the overplus, if any, being rendered to the owner himself (*i*); and this is now substantially the law relating to the sale of goods taken in distress for rent,]—it being nevertheless remembered, that, by the Law of Distress Amendment Act, 1888 (*k*), s. 5, making general a similar provision contained in the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), ss. 50, 51, the goods need not in general now be *appraised* before sale, requiring to be appraised only if the tenant, or other the owner of the goods, in writing requires such appraisement to be made; and that, by the same Act (sect. 6), the period of *five days* may be extended to a period of not more than *fifteen days*, if the tenant, or other the owner of the goods, in writing requests such extension and gives the prescribed security. But it ought to be further mentioned, that, by the

(*f*) Bro. Abr. tit. Distress, 71.

(*g*) 2 W. & M. c. 5; 8 Ann. c. 18; 4 Geo. 2, c. 28; 11 Geo. 2, c. 19; 57 Geo. 3, c. 93.

(*h*) *Wilson v. Nightingale*, 8

Q. B. 1054; *Lucas v. Tarleton*, 3 H. & N. 116.

(*i*) *Knight v. Egerton*, 7 Exch. 407; *Evans v. Wright*, 2 H. & N. 527; *Hart v. Leach*, 1 Mee. & W. 560.

(*k*) 51 & 52 Vict. c. 21.

Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 44, a landlord may not distrain (as regards tenancies to which that Act is applicable) for rent which became due more than a year before the distress,—the Act providing, however, that where a quarter year, or half a year, beyond the legal day of payment, is ordinarily allowed for payment of the rent, the rent shall, for the purposes of this limitation on the right of distress, be deemed to become due on the expiration of such quarter year or half year (*l*). And note, that equally as in the case of distresses for cattle *damage feasant*, a landlord distraining for rent cannot, while he holds the distress, sue for the rent (*m*).

[As for the proceeding called a replevin, it will be sufficient for the present to state, that to replevy, (*replegiare*, to take back the pledge,) is when a person who has been distrained upon for rent, or for cattle damage feasant, or for suit and service, applies to the proper authority (that is to say, to the registrar of the county court) to interpose (*n*): and thereupon he has the distress returned into his own possession, giving security to try the right of taking it, in a particular action (called the action of replevin),—wherein the owner of the goods is the plaintiff and the distrainer the defendant,—and engaging, in the event of being unsuccessful, to return the distress into the hands of the distrainer.

The many particulars which require to be observed in the taking of a distress, used formerly to make a distress a hazardous kind of proceeding,—especially as, if any one irregularity was committed, it vitiated the whole, and made the distrainer a trespasser *ab initio* (*o*); but now, by the 11 Geo. II. c. 19, s. 19, it is provided, that where

(*l*) *Ex parte Bull, In re Bew*,
18 Q. B. D. 642.

(*m*) *Lehain v. Philpott*, Law
Rep., 10 Exch. 242.

(*n*) 51 & 52 Vict. c. 43, s. 134;
46 & 47 Vict. c. 61, s. 46.

(*o*) *The Six Carpenters' Case*,
8 Co. Rep. 1466; *Attack v.*
Bramwell, 3 B. & Smith, 520.

[any distress shall be made for any kind of *rent* justly due, and any subsequent unlawful act or irregularity shall be committed by the party distraining, the distress itself shall not therefore be deemed unlawful, or the parties making it trespassers *ab initio* (*p*); but the party grieved shall only have an action for the real damage sustained, and not even that, if tender of amends is made before any action is brought (*q*). And the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 145, contains like provisions applicable to a landlord recovering the possession of small tenements under the provisions contained in sections 138 to 144 of that Act.

(6) THE SEIZING OF HERIOTS DUE ON THE DEATH OF A TENANT.—This species of self remedy is not unlike that of taking cattle or goods in distress (*r*); and for that species of heriot which is called heriot-service, the lord may distrain as well as seize; but for heriot custom, (which Sir Edward Coke says lies only in *prender*, and not in *render*,) the lord may seize the identical thing itself, but cannot distrain any other chattel for it (*s*). The like speedy and effectual remedy by *Seizure* is given with regard to many things that are said to lie in franchise, as waifs, wrecks, estrays, and the like; all of which the persons entitled thereto may seize, without the aid of a court,—not that they are debarred of their remedy by action, but they have also this other, and more speedy remedy, for the better asserting their property,—the thing to be claimed being frequently of such a nature, that it might be out of the reach of the law before any action could be brought.

(*p*) *Gambrell v. Earl of Falmouth*, 5 Ad. & El. 403.

(*q*) *Harvey v. Pocock*, 11 Mee. & W. 740; *Rodgers v. Parker*, 18 C. P. 112.

(*r*) As to heriots, *vide sup.* vol. i. pp. 439, 455.

(*s*) Co. Cop. s. 25; *Odiham v. Smith*, Cro. El. 590; *Major v. Brandwood*, Cro. Car. 260.

[(7) REDRESS BY ACCORD AND SATISFACTION.—An *accord* is an agreement to make satisfaction, entered into between the party injuring and the party injured, and which, when performed, is a bar of all actions upon the same account. As if a man contract to build a house or deliver a horse, and fail in it ; this is an injury, for which the sufferer may have his remedy by action : but if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action (*t*). And note, that in an action by several plaintiffs for a joint demand, the defendant may plead an accord and satisfaction with any *one* of them (*u*).

But it is to be observed, Firstly, that the action will not be taken away by mere accord without actual satisfaction ; *e.g.*, in the case supposed, the mere agreement to accept the sum of money will not, until actual payment of the amount, bar the action on the original agreement to build the house or deliver the horse,—for this would only be substituting one right of action for another ; and, Secondly, that the taking a smaller sum of money in lieu of a greater sum of fixed or certain amount, does not answer to the legal idea of satisfaction ; *e.g.*, if a man owe 100*l.*, an agreement between him and his creditor that he shall pay 50*l.* in satisfaction, will not though the latter sum be actually paid, suffice in law to bar the action on the original debt ; but if anything except money be taken in lieu of a fixed sum of money, the action for the latter will be barred, however much its amount may exceed the value of the thing so accepted (*x*) ;] and, Thirdly, that if the joint obligees are entitled to the debt as tenants in

(*t*) 9 Rep. 79.

(*u*) *Wallace v. Kelsall*, 7 Mee. & W. 264 ; *Thurman v. Wild*, 11 A. & E. 453 ; *Jones v. Broadhurst*, 9 C. B. 173.

(*x*) *Pinnel's Case*, 5 Rep. 117 a ; *Cumber v. Wane*, Stra. 426 ;

Sibree v. Tripp, 15 Mee. & W. 23 ;

Goddard v. O'Brien, 9 Q. B. D. 37 ;

Beer v. Foakes, 11 Q. B. D. 221 ;

Day v. M'Lea, 22 Q. B. D. 610 ;

Bidder v. Bridges, 37 Ch. Div.

406.

common in equity (and not as joint tenants), an accord and satisfaction made to one of them will be no defence to a subsequent action by the others (*y*).

(8) REDRESS BY ARBITRATION.—[*Arbitration* is where the parties injuring and injured submit all matters in dispute, concerning any personal chattel or personal wrong, to the judgment of two or more *arbitrators*, who are to decide the controversy (*z*); and it is usual to add, that another person be called in, if they fail to agree, as *umpire*—*imperator* or *impar* (*a*),—to whose sole judgment the dispute is then referred: and occasionally there is only one arbitrator originally appointed. The decision, in any of these cases, must be in writing, and is called an *award*; and thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice (*b*).] And even some criminal offences, *e.g.*, ordinary assaults (*c*), and nuisances (*d*), and the like, for which the party injured may (at his option) either prosecute or sue (*e*), may be thus disposed of. Originally, the submission to arbitration might have been either by word of mouth or by deed; but in either case the submission was revocable; and it became the practice

(*y*) *Steeds v. Steeds*, 22 Q. B. D. 537.

(*z*) The legislature has prescribed this remedy in a variety of special cases,—*e.g.*, in questions as to *tithes and commons* (6 & 7 Will. 4, c. 71; 8 & 9 Vict. c. 118); as to compensation for lands taken, for *undertakings of a public nature* (8 & 9 Vict. cc. 16, 18,—c. 18 being amended by 46 & 47 Vict. c. 15); for *railways* (c. 20); for *markets and fairs* (10 & 11 Vict. c. 14); for *water works* (c. 17); for *harbours, docks, and piers* (c. 27); for *improvements*

in towns (c. 34); for *land drainage* (c. 38, and 24 & 25 Vict. c. 133); and for *cemeteries* (10 & 11 Vict. c. 65).

(*a*) Whart. Angl. Sacr. i. 772; Nichols. Scot. Hist. Libr. ch. i. *prope finem*.

(*b*) Brownl. 55; 1 Freem. 410.

(*c*) *Elworthy v. Reid*, 2 Sim. & Stu. 372.

(*d*) *Dobson v. Groves*, 6 Q. B. 637.

(*e*) *The Queen v. Hardey*, 14 Q. B. 529; *The Queen v. Blakemore*, *ib.* 544.

therefore to enter into mutual bonds, with condition to stand to the award, or, in default thereof, to pay a certain penalty.

Experience having shown the great use of these peaceable and domestic tribunals, especially in matters of account, the legislature established the use of them, as well in controversies where causes were depending, as in those where no action was brought,—enacting by the 9 Will. III. c. 15 (since repealed), that all who desired to end any such controversies might agree in writing that their submission to arbitration or umpirage should be made a rule of court: whereupon the court was to make a rule that such submission, and award made therein, should be conclusive; and, after such rule, the parties disobeying the award were liable to be punished as for a contempt of court,—unless, indeed, the award was set aside for corruption, or for undue means used in its procurement, or for other misbehaviour in the arbitrators or umpire, proved on oath to the court, within one Term after the award was made (*f*); and in consequence of this statute, it became an important part of the business of the courts to enforce the execution of such awards; and an award might be enforced either by action on the award, or by process of contempt for disobedience to the order of the court (*g*). Subsequently, by the 3 & 4 Will. IV. c. 42, it was provided, that the power of any arbitrator or umpire appointed in pursuance of a submission containing such agreement as aforesaid to make the arbitration a rule of court—or appointed by any rule of court, or judge's order, in any action—should not be revocable by either party without the leave of the court; but although, after that Act, such an agreement to refer to arbitration could not have been revoked by one of the parties thereto without the consent of the other, the

(*f*) *College of Christ v. Martin*,
3 Q. B. D. 16.

(*g*) *The Queen v. Hemsworth*,
3 C. B. 745.

appointment of a particular arbitrator might still have been revoked before award made (*h*).

The two last-mentioned Acts, with certain others in amendment thereof, have now been repealed by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), by which it has been provided (among other things), that every submission in writing (sect. 27), unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court, and shall have the same effect in all respects as if it had been made an order of the court (sect. 1) ; and the Arbitration Act, 1889, has also further enacted as follows :—That every submission to arbitration shall (excepting so far as it may expressly provide to the contrary) be deemed to include the following provisions, that is to say :—That if no other mode of reference is provided, the reference shall be to a single arbitrator ; that if the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make their award ; that the arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission,—or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award ; that if the arbitrators have allowed their time or extended time to expire without making an award,—or have delivered to any party to the submission, or to the umpire, a notice in writing, stating that they cannot agree,—the umpire may forthwith enter on the reference in lieu of the arbitrators ; that the umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired,—or on or before any later day to

(*h*) *Piercy v. Young*, 14 Ch. Div. 210 ; *Re Fraser and Ehrensperger* 12 Q. B. D. 310.

which the umpire by any writing signed by him may from time to time enlarge the time for making his award ; that the parties to the reference and all persons claiming through them respectively, shall (subject to any legal objection) submit to be examined by the arbitrators or umpire on oath or affirmation, in relation to the matters in dispute, and shall (subject as aforesaid) produce before the arbitrators or umpire all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and shall do all other things which during the proceedings on the reference the arbitrators or umpire may require ; that the witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation ; that the award to be made by the arbitrators or umpire shall be final and binding on the parties, and the persons claiming under them respectively ; and that the costs of the reference and award shall be in the discretion of the arbitrators or umpire,—who may direct to and by whom and in what manner these costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client (*i*). And the Act further provides, that the arbitrators or umpire shall, unless the submission expresses a contrary intention, have power to state their award as to the whole or part of the matters comprised in the submission, in the form of a special case for the opinion of the court, and also to correct any clerical mistake or error in the award, arising from any accidental slip or omission (sect. 7).

As to the effect of an award, it is in general, and as a consequence of the provision in that behalf contained or implied in the submission, conclusive and final ; and upon an action or other proceeding brought to enforce it, no defence can be raised *unless in respect of some defect apparent on the*

face of the award itself,—the rule being that any *extrinsic* objection must be taken in the shape of a substantive application to the court to set aside the award (*k*). And with reference to the setting aside of awards, it is proper to observe as follows : That an award might always have been set aside on any ground which rendered it an illegal award (*l*) ; and before the award was made, the arbitrator (or umpire) might, if shown to be personally improper to act in the matter, have been restrained by injunction from acting under the reference (*m*) ; and, in a proper case, the court would have directed the arbitrator (or umpire) as to the law applicable to the case, where he was proceeding contrary to such law (*n*). And it is now provided, by the Arbitration Act, 1889 (by sect. 10), that, in all cases of reference to arbitration, the court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire ; and (by sect. 11) that where an arbitrator or umpire misconducts himself, the court may remove him ; and where either the arbitrator or umpire has misconducted himself, or the arbitration or award has been improperly procured, the court may set aside the award. And it has been further provided, by the same Act by (sect. 19), that any referee, arbitrator, or umpire may, at any stage of the proceedings under a reference, and shall if so directed by the court or a judge, state in the form of a special case, for the opinion of the court, any question of law arising in the course of the reference. And it having been a provision of the repealed statute 9 Will. III. c. 15, that an application to set aside an award must have been made before the last

(*k*) *Braddick v. Thompson*, 8 East, 344 ; *Paull v. Paull*, 2 Dowl. 340 ; *Grazebrook v. Davis*, 5 B. & C. 534 ; *Macarthur v. Campbell*, 2 Ad. & Ell. 52.

(*l*) *Mercier v. Pepperell*, 19 Ch. D. 58.

(*m*) *Beddow v. Beddow*, 9 Ch. D.

99 ; *Pescod v. Pescod*, W. N., (1888) p. 2.

(*n*) *Hart v. Duke*, 32 L. J. Q. B. 55 ; *East and West India Docks Co. v. Kirk and Randall*, 12 App. Ca. 738 ; and disting. *James v. James*, 22 Q. B. D. 669.

day of the *Term* next after the award was made and published (*o*),—a provision which was maintained in the Common Law Procedure Act, 1854, s. 9,—under the present practice, the application is to be made at any time before the last day of the *Sittings* next after the award has been made and published (*p*), the application being no longer by motion *ex parte*, but by motion *on notice*, and the notice specifying the grounds of the application (*q*).

The time for making the award is that agreed upon in the submission; and when no time is therein specified, it is three months (*r*); but in either case the court will extend the time (*s*), but in no case beyond the ultimate period (if any) prescribed by statute (*t*); and where the court has *remitted* an award, then (unless the order otherwise directs) the arbitrator or umpire is to make his award within three months after the date of the order (*u*).

The award, once it has been duly made, and the time for setting it aside has expired,—or (*semble*) even before that time,—may be enforced in like manner as a judgment or order of the court to the like effect may be enforced (*x*),—that is to say, either by process for contempt in the manner heretofore usual, or by such other means as shall, under the circumstances, be appropriate and conveniently applicable.

II. Secondly, REDRESS (or Relief) BY THE MERE ACT (or Operation) OF THE LAW :

(1) **RETAINER** is where a debtor makes his creditor executor of his will, or where the creditor obtains letters of administration to his debtor,—in either of

(*o*) *Young v. Timmins*, 1 Tyrw. 230, n.; 36 & 37 Vict. c. 66, s. 26; and *Smith v. Parkside Mining Co.*, 6 Q. B. D. 67.

(*p*) Ord. lxiv. r. 14.

(*q*) Ord. lii. rr. 3, 4.

(*r*) 52 & 53 Vict. c. 49, s. 2, and Sch. I.

(*s*) *Lord v. Lee*, L. R. 3 Q. B. 404; *Re May and Harcourt*, 13 Q. B. D. 688; 52 & 53 Vict. c. 49, s. 9.

(*t*) *In re Mackenzie*, 17 Q. B. D. 114.

(*u*) 52 & 53 Vict. c. 49, s. 10.

(*x*) *Ibid.* s. 12.

which cases, the law gives the creditor a remedy for his debt, by allowing him to *retain* so much as will pay himself, before any others whose debts are of equal degree (*a*). [Which remedy is by the mere act of the law, and is grounded upon this reason,—that the executor or administrator cannot sue himself, but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose,—for otherwise, by being made executor, he would be put in a worse condition than all the other creditors. But, as the law stands, the effect of this right of retainer is to put the executor or administrator in a better position than the other creditors; because it enables him to obtain payment *first*, (among all creditors of equal degree,) and before any other has had time to commence an action; and this seems to illustrate a remark of Lord Bacon, that the benignity of the law is such, as when, to preserve the principles and grounds of law, it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse (*b*). However, the executor shall not retain his own debt in prejudice to creditors of a higher degree; for the law only puts him in the same situation as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt, to the prejudice of that of his co-executor in equal degree; but both shall be discharged in proportion (*c*). Nor shall an executor of his own wrong be in any case permitted to retain (*d*).] Moreover, the right of retainer exists in respect of *legal* assets only (*e*); and these must have come to the hands

(*a*) 1 Roll. Abr. 922; Plowd. 543.

(*b*) Bac. Elem. ch. 9.

(*c*) Vin. Abr. tit. Executors,
D. 2.

(*d*) 5 Rep. 30.

(*e*) *Richmond v. White*, 12 Ch. D.
361; *Campbell v. Campbell*, 16
Ch. D. 198; *Crowder v. Stewart*,
16 Ch. D. 368; *Walters v. Walters*,
18 Ch. D. 182.

of the executor (*f*) ; but the remedy by retainer, when it is available, extends also to claims for damages arising on the breach of pecuniary contracts,—*scilicet*, when such damages are ascertainable by a recognized standard or measure (*g*).

An administratrix who (under the covenant of her intestate) is entitled to an annuity, may retain out of the estate all arrears of the annuity accruing due during the administration of the estate ; but (when that estate is insolvent) she cannot retain any lump sum on account of the continuing liability to pay the annuity (*h*) ; and similarly, an executor may retain out of the legacy of the principal debtor any sums paid by the testator as a surety for such debtor (*i*),—but not, *semble*, anything on account of the continuing liability of the testator's estate as surety (*k*).

(2) REMITTER is where he who hath the right of entry in lands, but is out of possession, obtains afterwards the possession of the lands by some subsequent (and, of course, defective) title ; in which case he is remitted or sent back, by operation of law, to his antient and more certain or perfect title (*l*). For the possession which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good one, his defeasible estate being, in a sense, merged therein, and utterly defeated or annulled by the instantaneous act of the law, without his participation or consent (*m*). Thus, if A. disseise B. (that is, wrongfully turn B. out of possession of the freehold), and afterwards (without deed) demise the land to B. as tenant from year

(*f*) *Norton v. Compton*, 30 Ch. Div. 15.

(*g*) *Loane v. Casey*, 2 W. Bl. 965.

(*h*) *Fowler v. James*, [1896] 1 Ch. 48.

(*i*) *In re Watson*, [1896] 1 Ch. 925.

(*k*) *In re Binns*, [1896] 2 Ch. 584.

(*l*) Litt. ss. 659, 693, 695 ; Co. Litt. 363 b ; Gilb. Ten. 129 ; 1 Sand. Uses, 166 ; *Doe v. Woodroffe*, 10 Mee. & W. 608.

(*m*) Co. Litt. 358 ; *Wood v. Sir J. Shurley*, Cro. Jac. 409.

to year, under which demise B. entereth,—this entry is a remitter to B., who is in of his former and surer estate (*n*). But if the demise for years had been by deed or by matter of record, there B. would not have been remitted; for if a man by *deed* takes a lease of his own lands, it shall bind him to the rent and covenants,—because he shall never be allowed to affirm, that his own deed is ineffectual; and matter of record is evidence, which a man cannot controvert (*o*). And the reason given by Littleton, why this remedy by remitter was allowed, is because otherwise he who hath right would be deprived of all remedy (*p*),—for as he himself is in possession of the land, and cannot therefore enter upon himself, there is no person upon whom he can make entry (*q*).

(*n*) Litt. s. 695; Gilb. Ten. 129.

(*o*) Gilb. Ten. *ubi sup.*

(*p*) Litt. s. 661; Litt. by Butl.

347 b. n. (1).

(*q*) Litt. s. 693; Gilb. Ten.

ubi sup.; Co. Litt. by Butl.

ubi sup.

CHAPTER II.

OF THE COURTS IN GENERAL.

[WE now proceed to consider the redress of injuries by action or suit ; and here it will not be improper to observe, that although, in the several cases of redress by the act of the parties mentioned in the previous chapter, the law allows an extra-judicial remedy, yet that does not exclude the ordinary remedy by action,—*e.g.*, though I may defend myself from external violence, I yet am entitled alternatively to an action of assault and battery : and though I may retake my goods if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action for their seizure and detention : and I may either abate a nuisance by my own authority, or call upon the law to do it for me : and I may either distrain for rent, or have an action of debt for the amount. But before entering upon the nature and the varieties of actions and suits, it is convenient to consider the courts themselves,—their nature and incidents, and the varieties of them.

Firstly, a court is defined to be a place wherein justice is judicially administered (*a*) ; and all courts of justice are derived from the power of the crown ; for, whether created by Act of Parliament or letters-patent, or subsisting by prescription,—the only three methods by which any court of judicature can exist,—the king's consent in the two former is expressly, and in the latter is impliedly, given (*b*) ; and in all these courts, the sovereign is supposed, in contemplation of law, to be always present, being represented

(a) Co. Litt. 58.

(b) Co. Litt. 260.

[by his judges, whose power is only an emanation from his royal prerogative. And for the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a variety of courts, some with a more limited, others with a more extensive, jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review.

Some of these courts are *inferior* and others *superior*; some have a jurisdiction at *common law* and some *in equity*, and some in both; others have an *ecclesiastical* or *maritime* jurisdiction only; and in others again, these various jurisdictions are combined. And we shall consider all these varieties of courts in their respective places; but we may here mention one distinction that runs through them all, viz., that some of them are courts *of record*, and others *not of record*. Now a court of record is one whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony,—which rolls are called the records of the court; and records are of such high and super-eminent authority, that their truth is not to be called in question,—for nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary (*c*); and if the existence of a record be denied, it shall be tried by nothing but itself,—that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But this rule does not prevent the court from enquiring, *e.g.*, whether the record (in the case of a judgment debt) was based on no consideration,—a matter which is often very material in bankruptcy (*d*); also, if there appear any mistake of the clerk in making up the record, the court will direct him to amend it;] and in general, all slips (being slips

(*c*) Co. Litt. 260; *sup.* vol. I. 415, 606; *In re Lennox*, 16 pp. 26, 337. Q. B. D. 316; *Scotch Whisky Distillers*, 22 Q. B. D. 83.

(*d*) *In re Tollemache*, 14 Q. B. D.

merely) in legal proceedings (including records) may be amended by an order of the court, to be obtained in a summary way (*e*).

[All courts of record being the courts of the sovereign, in right of his crown and royal dignity (*f*), therefore every court of record has authority to fine and imprison for contempt of its authority (*g*): and the merely conferring the power of fine or imprisonment for contempt on a new jurisdiction, makes it a court of record (*h*).] But in some courts of record, *e.g.*, in county courts, this power is limited to contempts committed *in facie curiæ*, that is to say, to wilful insults to the judge, or to any juror or witness, registrar or other officer of the court, during his attendance in court, or in going to or returning from the court, and to wilful interruptions of the business of the court, and to wilful misbehaviour in court (*i*). [Courts *not* of record, on the other hand, are courts of inferior dignity, and in a less proper sense the king's courts—and these are not, as the general rule, intrusted by the law with any power to fine or imprison for contempt (*k*); and in these, the proceedings not being enrolled or recorded, as well their existence, as the truth of the matters therein contained, shall, if disputed, be tried and determined by a jury (*l*).

(*e*) Ord. xxviii. (1883), r. 11; *Mellor v. Swire*, 30 Ch. Div. 239; *Stanier v. Evans*, 34 Ch. D. 470.

(*f*) Finch. L. 231.

(*g*) 8 Rep. 38 b; Hawk. b. 2, ch. 22, s. 1; Bac. Ab. Courts, E.; *R. v. Clement*, 4 B. & Ald. 233; *R. v. Davidson*, 5 B. & Ald. 337; *R. v. James*, *ib.* 894; *Miller v. Knox*, 4 Bing. N. C. 574; *Doe d. Cardigan v. Bywater*, 7 C. B. 794.

(*h*) *Groenvelt v. Burwell*, Salk. 200; *Ex parte Fernandez*, 10 C. B.

(N.S.) 1; *Reg. v. Castro*, Law Rep., 9 Q. B. 219.

(*i*) 51 & 52 Vict. c. 43, ss. 162, 163, re-enacting like provisions in 9 & 10 Vict. c. 95, s. 113, and 12 & 13 Vict. c. 101, s. 2; *Levy v. Moylan*, 10 C. B. 189; *The Queen v. Lefroy*, Law Rep., 8 Q. B. 134.

(*k*) *Dyson v. Wood*, 3 Barn. & Cress. 449.

(*l*) 2 Inst. 311; 8 Rep. 38 b; 11 Rep. 43 b; 3 Bl. Com. 24.

[To every court there must be at least three constituent parts, the *actor*, the *reus*, and the *judex*; the *actor*, or plaintiff, who complains of an injury done : the *reus*, or defendant, who is called upon to make satisfaction for it : and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy ; and it is usual, in the higher courts, to have solicitors and counsel as assistants.]

Of solicitors and counsel we have already spoken elsewhere in this work (*m*) ; and we shall now only observe, with reference to their connection with courts of justice, that a solicitor answers to the *procurator*, or proctor, of the civilians and canonists, being one who is put in the place, stead, or *turn* of another, to manage his proceedings in a cause ; and for this reason he used to be called an *attorney-at-law*, though the name of solicitor is now generally adopted. [Formerly, every suitor was obliged to appear in person, to prosecute or defend his suit, unless by special licence under the king's letters patent ; but, as in the Roman law (*n*), so with us, upon the principle of convenience,] it is now permitted, in general, that solicitors may prosecute or defend in the absence of the parties to the action ; but as regards an infant, he or she sues by a next friend and defends by a guardian ; and it is the next friend or the guardian who appoints the solicitor (*o*) ; and this rule used also to apply substantially to married women, who sued by their next friends and defended with their husbands.

Solicitors are now formed into a regular body [and are

(*m*) As to solicitors, *vide sup.* pp. 234 *et seq.* ; as to counsel, *sup.* vol. i. p. 7.

(*n*) Inst. Lib. 4, tit. 10.

(*o*) Bro. Abr. tit. Ideot, 4 ; Co.

Litt. 135 b ; 2 Saund. 212, n. (4) ; *Beverley's Case*, 4 Rep. 124 b ; *Oulds v. Sansom*, 5 Taunt. 261 ; F. N. B. 25.

[duly admitted to the execution of their office (*p*) ; and they are officers of the courts in which they practise ; and as they have many privileges on account of their attendance there, so they are peculiarly subject to the animadversion of the judges.] Of counsel, otherwise called (among the civilians) *advocates*, there are (or formerly were) two species or degrees, namely, barristers and serjeants. Barristers are admitted after a period of study, in the Inns of Court, and (in our old books) are styled apprentices, *apprenticii ad legem*,—not having been deemed qualified to execute the full office of an advocate till they were of sixteen years' standing ; at which time, according to Fortescue, they might be called to the state and degree of serjeants, or *servientes ad legem* (*q*). How antient and honourable the degree of serjeant was, hath been so fully displayed by many learned writers, that it need not be here enlarged on (*r*) ; it is sufficient to observe, that serjeants at law were bound, by a solemn oath, to do their duty to their clients (*s*) ; and it used also to be the custom for the judges to be admitted into this venerable order before they were advanced to the bench (*t*),—and otherwise, they were not qualified (at least, the barons of the exchequer were not qualified) to become justices of assize (*u*) ; but the necessity for this has now ceased, and with it the custom,—it having been enacted, by the 36 & 37 Vict. c. 66, s. 8, that no person

(*p*) So early as the statute 15 Edw. 2 (Stat. de fin. et attorn.), regulations were made as to their admission ; and by 4 Hen. 4, c. 18, it was enacted, that they should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty.

(*q*) De LL. c. 50.

(*r*) See Fortesc. ch. 50 ; 10 Rep. pref. ; Dugdal. Orig. Jurid. ; *Case*

of the Serjeants, 6 Bing. N. C. 235 ; a tract by Serjeant Wynne, printed in 1765, entitled “ Observations touching the Antiquity and Dignity of the Degree of Serjeant at Law ” ; and the treatise called “ *Serviens ad Legem*,” by Mr. Serjeant Manning.

(*s*) 2 Inst. 214.

(*t*) Fortesc. ch. 50.

(*u*) 14 Edw. 3, st. 1, c. 16 ; 3 Bl. Com. p. 27.

appointed a judge, either of the High Court of Justice or of the Court of Appeal, shall be required to take or to have taken the degree of sergeant at law ; and no serjeants have in fact been created since the year 1875.

From among the general body of counsel some are from time to time selected, who (on the nomination of the lord chancellor) are made by letters patent her Majesty's counsel ; and the two principal queen's counsel are called the attorney-general and the solicitor-general. [The first king's counsel, under the degree of serjeant, was Sir Francis Bacon, but he was so made *honoris causâ*, and without either patent or fee (*x*),—so that the first of the modern order (who are now the sworn servants of the crown) seems to have been Sir Francis North, afterwards lord keeper of the great seal to King Charles the Second (*y*). These counsel of the crown answer in some measure to the advocates of the revenue, *advocati fisci*, among the Romans ; for they must not be employed in any cause against their sovereign, without special licence (*z*),—in which restriction, they agree with the advocates of the fisc (*a*) ; but in the imperial law, the prohibition was carried still farther,—for, excepting in some peculiar causes, the fiscal advocates were not permitted to be concerned at all in private suits between subject and subject (*b*).

In addition to the creation of counsel to the crown, a custom has in modern times prevailed of granting letters patent of precedence among themselves, to such barristers as it is thought proper to honour with that mark of distinction ; whereby they are entitled to such rank and

(*x*) See his Letters, 256.

(*y*) See his Life, by Roger North,
37.

(*z*) Hence a queen's counsel cannot plead in court for the defendant in a criminal prosecution,

without a licence from the crown ; which licence is never refused ; but is procured at an expense of about 2*l.* 2*s.* (formerly 9*l.*).

(*a*) Cod. 2, 2, 1.

(*b*) Cod. 2, 7, 13.

[pre-audience as are assigned in their respective patents (*c*); which is sometimes next after the attorney-general, but usually next after the counsel to the crown then being.] Barristers with patents of precedence rank promiscuously with the king's counsel, and sit together with them (and with the serjeants) *within* the bar of the respective courts, instead of sitting *without* it, as is the case with counsel in general (*d*); but they are not the sworn servants of the king, and, consequently, without any licence had for that purpose, may accept a retainer in any cause against the crown. And they, and all other counsel, may indiscriminately take upon them the protection and defence of any suitors, whether plaintiff or defendant (*e*); who are therefore called their *clients*, like the dependents upon the antient Roman orators.

(*c*) The *queen's advocate* is usually placed immediately after the attorney-general. (See Manning's "*Serviens ad Legem*," pp. 19, 20.) It may also be noticed, that when there is a *queen consort*, her attorney and solicitor-general rank with those of the king's counsel who have patents of precedence. (Seld. Tit. of Hon. 1, 6, 7.)

(*d*) It may be observed, that, in the Exchequer Division of the High Court of Justice, there were appointed by the court two barristers, called the *post-man* and the *tub-man* (from the places in which they sat), who had a precedence in motions. (See *R. v. Bishop of Exeter*, 7 Mee. & W. 188.)

(*e*) At one time, an exception to this existed as regarded the Court of Common Pleas, the serjeants having the exclusive privilege of

being heard in that court, at its sittings in *banc*. And though, in 1834, a warrant issued under the sign manual, directing that this privilege should cease, yet the Court of Common Pleas refused to act upon its authority, and decided that, as the privilege was founded on immemorial usage, it could not be taken away by the *warrant* of the crown. (*Case of the Serjeants*, 6 Bing. N. C. 235.) However, it was enacted, by 6 & 7 Vict. c. 18, s. 61, that, in appeals to the Common Pleas from the revision courts, all barristers should be entitled to audience; and afterwards, by 9 & 10 Vict. c. 54, (see 3 C. B. 537), it was provided generally, that all barristers, according to their respective rank and seniority, should have equal right and privilege of practising, pleading, and audience, in the Common Pleas, together with the serjeants.

[The Roman orators, it is to be remembered, practised *gratis*; for honour merely, or at most for the sake of gaining influence; and so likewise it is established with us, that a counsel can maintain no action for his fees (*f*); which are given, not as *locatio vel conductio*, but as *quiddam honorarium*,—not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation (*g*); and so it was also laid down with regard to advocates in the civil law (*h*), whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80*l.* of English money (*i*).

It is also deserving of notice, that a counsel may, on his client's behalf, compromise the case, without any express instructions so to do, and even contrary to his instructions (*k*); also, that in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men, (a few of whom may sometimes insinuate themselves even into the most honourable professions,) it hath been holden, that a counsel is not answerable for any matter by him spoken in court relative to the cause in hand, and suggested in his client's instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless (*l*). But he is not therefore privileged to repeat the

(*f*) Davis, pref. 22; 1 Ch. Rep. 38; and as regards the effect of a *special contract* to pay a fixed sum of money, instead of the usual fees, see *Kennedy v. Broun*, 13 C. B. (N.S.) 677; *Mostyn v. Mostyn*, Law Rep. 5 Ch. App. 457; and *The Queen v. Doutre*, 9 App. Ca. 745.

(*g*) Davis, 23.

(*h*) Ff. 11, 6, 1.

(*i*) Tac. Ann. 1, 11, 7.

(*k*) *In re Hoblen*, 8 Beav. 101; *Mole v. Smith*, 1 Jac. & Walk. 673; *Swinfen v. Swinfen*, 18 C. B. 485; 1 C. B. (N.S.) 364; 24 Beav. 559; *Chambers v. Mason*, 5 C. B. (N.S.) 59; *Swinfen v. Lord Chelmsford*, 5 H. & N. 890; *Strauss v. Francis*, Law Rep. 1 Q. B. 379.

(*l*) *Hodgson v. Scarlett*, 1 B. & Ald. 232; *Munster v. Lamb*, 11 Q. B. D. 588.

[same matters out of court (*m*) ; and even in court, if he mention an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action at the suit of the party injured (*n*). Also, counsel guilty of deceit or collusion were, by the statute of Westminster the First (3 Edw. I.), c. 28, made punishable with imprisonment for a year and a day, and perpetual silence in the courts,—a punishment that even in more modern times has been inflicted for gross misdemeanors in practice (*o*).] And we may close our consideration of courts in general with this remark, that (as a general rule, hardly subject to exception,) solicitors and counsel possess the exclusive privilege of transacting business in the courts ; and the usage is for the solicitor to see the client and to instruct the counsel (*p*) ; nor, as the general rule, is any one (other than the party himself), unless he be either a solicitor or a counsel, allowed to address the court, or to examine or cross-examine the witnesses. Also, the work in chambers falls in general to solicitors, and the work in open court to barristers, who used to have an absolutely exclusive privilege in this latter respect (*q*) : but in quite recent times, counsel have been entitled to attend in chambers ; and as we have elsewhere noticed, solicitors may now, in certain of the courts, appear as advocates.

(*m*) *Flint v. Pike*, 4 B. & C. 473.

(*n*) *Brook v. Sir H. Montague*,
Cro. Jac. 90.

(*o*) Ray, 376.

(*p*) *Doe d. Bennett v. Hale*, 15
Q. B. 171.

(*q*) *Collier v. Hicks*, 2 B. & Ad.

668 ; Plac. Ab. 137 ; Canc. Rot.
22, *temp.* 32 Hen. 3 ; Matt. Par.
Hist. p. 1077.

CHAPTER III.

OF THE INFERIOR COURTS.

WE are next to consider the several species of courts ; and we shall treat in this chapter of the Inferior Courts, reserving for the next chapter the Supreme Court of Judicature and the House of Lords. And first, we may make this general observation with regard to all inferior courts, viz., that under the provisions of the Judicature Acts hereinafter considered, it is lawful for her Majesty from time to time, by order in council, to confer on any inferior court (of *civil* jurisdiction) the same jurisdiction in equity as has been conferred (as we shall presently see) on the modern county courts, and the same jurisdiction in admiralty as has been conferred on certain of the county courts ; and every inferior court which now or hereafter shall have jurisdiction in equity, or at law and in equity, and in admiralty respectively, is to have power to grant, and is required to grant, such relief, redress, or remedy, and to give such and the like effect to any ground of defence or counter-claim, equitable or legal, in as full and ample a manner, as the High Court of Justice itself,—subject to this, that if the defence or counter-claim involves matter beyond the jurisdiction of the court, its duty is to dispose of the whole controversy so far as relates to the demand and the defence ; and then it used not to give relief to the defendant on the counter-claim, so far as such relief was beyond the jurisdiction of the inferior court, but the whole matter was in that case transferred into the high court (*a*) ;

(*a*) 36 & 37 Vict. c. 66, ss. 88—90 ; *Davis v. Flagstaff Company*, 3 C. P. D. 228 ; *Ex parte Martin*, 4 Q. B. D. 212 ; *Martin v. Bannister*, *ib.* 491.

but now, unless either party objects in writing to the jurisdiction of the court, it will dispose of the counter-claim also (*b*).

The inferior courts are principally the following : (I.) The Court Baron ; (II.) The Hundred Court ; (III.) The Sheriff's County Court ; (IV.) The Borough Court ; (V.) The Courts of the Commissioners of Sewers ; (VI.) The County Courts ; (VII.) The Stannaries Court (now the County Court for Devon and Cornwall) ; (VIII.) The Ecclesiastical Courts ; (IX.) The Courts of the Universities of Oxford and Cambridge ; and (X.) The Court of Chivalry, and Courts Martial,—but some of these courts are now (practically) obsolete.

I. [THE COURT BARON is a court incident to every manor in the kingdom, to be holden by the steward within the manor (*c*) ; and it is of two natures (*d*),—the one a customary court, in which the steward of the manor is the judge, and the *copyholders* are the suitors, and their estates are transferred by surrender and admittance, and other matters are therein transacted relative to their copyhold estates ;] and the other a court of common law, held before the *freehold* tenants who owe suit and service to the lord of the manor, and who are *pares* of each other, and of which court the steward of the manor is merely the registrar and not the judge ; but the two species of courts baron, though in their nature distinct, are frequently confounded together (*e*). The freeholders' court (with which alone, as being a court of *justice*, we are now concerned) was antiently held every three weeks ; and its most important business was to determine, in the antient species of *real* action called the "writ of right," all controversies relating to *lands* within the manor (*f*) ;

(*b*) 47 & 48 Vict. c. 61, s. 18.

(*c*) 4 Inst. 268.

(*d*) Co. Litt. 58.

(*e*) 3 Bl. Com. p. 34.

(*f*) *Ibid.*

which jurisdiction was however greatly curtailed by the 3 & 4 Will. IV. c. 27, s. 36, and was afterwards, in effect, abolished by the 23 & 24 Vict. c. 126, s. 26. The court baron had also jurisdiction in any *personal* action, wherein the debt or damages claimed did not amount to 40*s.* (*g*) ; but the action might always have been removed into the superior court,—either before judgment, by writ of *pone* or of *accedas ad curiam* (*h*), or after judgment, by writ of *false judgment* (*i*) ; and by the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 14, provision was made enabling the lord of “any hundred, honor, manor, or liberty,” having any court in right thereof in which debts or demands might be recovered, to surrender the right of holding such court,—a provision which has been re-enacted in the County Courts Act, 1888 (51 & 52 Vict. c. 43) ; but as the court baron never ranked as a court of *record*, it fell within the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 28, which enacted that no action which could be brought in any county court should thereafter be commenced or be maintainable in any hundred or other inferior court not being a court of record.

II. [THE HUNDRED COURT is only a larger court baron, being held for all the inhabitants of a particular hundred, instead of a manor. The free suitors are here also the judges, and the steward, properly, the registrar,—as in the case of the freeholders’ court baron (*k*) ; and indeed the hundred court resembles the court baron in all points, except that in point of territory the hundred court is of a greater jurisdiction (*l*) ;] and like the court baron, and for the same reasons, and by the same acts of the

(*g*) Finch, 248.

(*h*) F. N. B. 4, 70 ; Finch, L. 444, 445 ; *Robinson v. Mainwaring*, 10 Q. B. 274.

(*i*) F. N. B. 18 ; *Brown v. Gill*, 3 D. & L. 123.

(*k*) *Bradley v. Carr*, 3 Man. & Gr. 221.

(*l*) Finch, L. 248 ; 4 Inst. 267.

legislature, this court (excepting in the case of the hundred court of Salford) is now extinct as a court of justice.

III. THE SHERIFF'S COUNTY COURT was a court incident to the jurisdiction of the sheriff; and it never ranked as a court of record; though from the earliest times down to the year 1846, it might have held pleas of debt or damages under the value of 40*s.* (*m*); [and by virtue of a special writ called a *justicies*, it might have entertained all personal actions to any amount,—the writ of *justicies* empowering the sheriff, for the sake of dispatch, to do the same justice in his county court, as might otherwise be had at Westminster (*n*). The court had jurisdiction also in many “real” actions], before such actions were (for the most part) abolished by the 3 & 4 Will. IV. c. 27. [The freeholders of the county were the judges in the court, and the sheriff was the president only, and the officer who carried the decisions of the court into execution (*o*); and it was owing to the attendance of the freeholders,—or their supposed attendance,—at the sheriff's county court, that fresh Acts of Parliament were wont at the end of every session to be there published, and outlawries proclaimed there; and why all popular elections which the freeholders were to make,—as formerly of sheriffs and conservators of the peace, and of coroners, verderors (*p*), and the like,—must have been made *in pleno comitatu*, *i.e.*, in full county court; and by the 2 & 3 Edw. VI. c. 25, the court was never to be adjourned longer than for one lunar month. In those antient times, the sheriffs county court was of great dignity and splendour, the bishop and the ealdorman (or earl), with the principal men of the shire, sitting therein (along with the sheriff) to administer

(*m*) 4 Inst. 266; *Tinniswood v. Pattison*, 3 C. B. 243.

(*o*) 3 Bl. Com. p. 36.

(*p*) *Reg. v. Conyers*, 8 Q. B.

(*n*) Finch, 318; F. N. B. 152; 981.
Com. Dig. (C.) 5, 7, 8.

[justice, both in lay and ecclesiastical causes (*q*) ;] but its dignity became much impaired when the bishop was prohibited, and the earl neglected, to attend it ; and in modern times, little resort was made to it as a court for the recovery of debts or damages ; and now its jurisdiction in this respect seems to be wholly superseded, by the creation of the modern county courts to be presently considered (*r*).

(*q*) Wilkins's Leg. Anglo-Sax. LL. Eadg. ch. 5.

(*r*) There were also certain other inferior courts of *civil* jurisdiction, —which are now either expressly abolished or fallen into disuse, that is to say :—(1.) *The Court of Great Sessions in Wales*, which was abolished by the 11 Geo. 4 & 1 Will. 4, c. 70. (2.) *The Court of the Marshalsea* (abolished by the 12 & 13 Vict. c. 101, s. 13), which held pleas of trespass, committed within the palace precincts, where one of the parties was of the royal household ; and pleas of debt and of assumpsit where both parties were of that establishment. (3.) *The Palace Court* at Westminster (abolished by the 12 & 13 Vict. c. 101, s. 13), which held pleas of all personal actions arising within twelve miles of the palace at Whitehall. (4.) *The Court of Piepoudre* (*curia pedis pulverizati*), so called from the dusty feet of the suitors frequenting the same ; which is a court of record incident, by the common law, to every fair or market ; and of this court, the steward of the owner of the market is the judge ; with power to administer justice for all commercial injuries, in that very fair or

market, and not in any preceding one (3 Bl. Com. pp. 33, 34 ; Bac. Ab. Court of Piepoudre ; Com. Dig. Market (G.)). (5.) *The Forest Courts*, for the government of the royal forests in different parts of the kingdom ; and for the punishment of all injuries done to the venison or deer, to the vert or greensward, and to the covert in which the deer are lodged (3 Bl. Com. p. 71 ; Com. Dig. Chase, R. 1, 2 ; Bac. Ab. Courts, Courts of the Forest ; *R. v. Conyers*, 8 Q. B. 981). And (6.) *The Court of Policies of Assurance*, a court established by the 43 Eliz. c. 12 and 14 Car. 2, c. 23, for determining in a summary way, under commission from the Lord Chancellor, all causes concerning policies of assurance in London (3 Bl. Com. p. 75) ; but all questions concerning such policies are now determined in the High Court ; and the statutes of Eliz. and Charles have been repealed by the 26 & 27 Vict. c. 125. There is also a court for the *Cinque Ports*, but the (ordinary) civil jurisdiction of the court has now been abolished (18 & 19 Vict. c. 48 ; 20 & 21 Vict. c. 1).

IV. BOROUGH COURTS exist within many cities and boroughs throughout the kingdom, being held by prescription, charter, or Act of Parliament (*s*); and by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), re-enacting a similar provision in the Municipal Corporations Act, 1835 (5 & 6 Will. IV. c. 76), in those boroughs to which that Act extends and in which there is a separate court of quarter sessions, the recorder is in the general case constituted, by virtue of his office, the judge of the borough court; and the same Act regulates also the jurisdiction of the court, and the qualification and summoning of the jurors therein (*t*), the general procedure being regulated by the 2 & 3 Vict. c. 27. However, under the provisions (already referred to) contained in the County Courts Act, 1852 (15 & 16 Vict. c. 54), sect. 7, enabling the council of any borough (or the ratepayers of any parish) within the limits of which there is any local court other than a county court to petition the crown for the exclusion from such local court of all causes whereof the county court of the district has cognizance,—a provision continued by the County Courts Act, 1888, s. 7; and under the provisions contained in the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 29,—a provision repealed, but in substance re-enacted by the County Courts Act, 1888, s. 7, whereby it is enacted, that where any action which could have been brought in a county court, is

(*s*) The chief of these within the *City of London* are (1.) The *Court of Hustings*,—a tribunal analogous to the sheriff's county court; (2.) The *Lord Mayor's Court*,—as to which see *The Lord Mayor of London v. Cox*, Law Rep., 2 H. L. 239; *Davies v. MacHenry*, *ib.* 3 Ch. App. 200; *Davis v. Flagstaff Mining Co.*, 3 C. P. D. 228; *Paine v. Slater*, 11 Q. B. D. 120; *Alderton v. Archer*, 14 Q. B. D. 1; and the statute 20 & 21 Vict.

c. clvii, by which the practice and procedure of this court were amended and its powers enlarged; also The Mayor's Court of London, Rules, 1892; and (3.) The *City of London* (formerly called the *Sheriffs' Court*, which is now a county court. (See 51 & 52 Vict. c. 43, s. 185, re-enacting 30 & 31 Vict. c. 142, s. 35.)

(*t*) 45 & 46 Vict. c. 50, ss. 162—169.

brought in some other inferior court, and the verdict recovered is less than 10*l.*, the plaintiff shall have no more costs from the defendant than if the proceeding were in the county court, unless the judge of the inferior court shall certify that the action was properly brought in his court,—borough courts have, in many cases, ceased to exist.

On the other hand, some of the borough courts having been found to work usefully and to be worth preserving, it was therefore enacted by the Borough and Local Courts Act, 1872 (35 & 36 Vict. c. 86), that in all cases of final judgment for debt or damage not exceeding twenty pounds (exclusive of costs) obtained in any borough court, that court might send a writ or precept for the recovery of the same to the registrar of the county court within the jurisdiction of which the defendant had any goods or chattels, and the writ or precept was thereupon to be executed by the high bailiff of the county court, and to be returned to the bailiff or serjeant at mace of the local court (*u*) ; and the Act contained also provisions enabling the judge to appoint a deputy or assistant judge, being a barrister of not less than seven years' standing (*x*) ; and the Act also otherwise provided for the greater efficiency of the court (*y*), and for securing due regularity in its proceedings ; and there was contained in the schedule to the Act a series of minute provisions having reference to the procedure of the court, including the statement of special cases for the opinion of the High Court of Justice, and providing for the removal of judgments or orders for not less than twenty pounds (exclusive of costs) into the High Court, to be there executed, and for the settlement by the judge (subject to the approval of two judges of the High Court) of the fees to be taken by the bailiff, the registrar, and other officers of the court. All which provisions appear to be still in force in borough courts ; and by the 46 & 47 Vict. c. 49, s. 8,

(*u*) 35 & 36 Vict. c. 86, s. 6.

And see 45 & 46 Vict. c. 31.

(*x*) 35 & 36 Vict. c. 86, s. 7.

(*y*) Sect. 4.

in extension of the like provision as to county courts which is contained in the 44 & 45 Vict. c. 68, s. 27, the Queen may from time to time (by order in council) extend to *any* inferior court of civil jurisdiction,—and therefore to any borough court,—any of the provisions of the Judicature Act, 1873, and of the Acts amending that Act; and the Judicature Act, 1884 (47 & 48 Vict. c. 61), has provided more effectually for bringing about a uniformity of procedure in all inferior courts, and for ensuring the conformity, more or less, of the rules of practice therein to the rules of the Supreme Court,—sect. 24 of the last mentioned Act having subjected the rule-making authorities of all inferior courts to the control of the Rule Committee of the Supreme Court hereinafter referred to (*z*); and all appeals from borough (and other local) courts are to a divisional court of the High Court of Justice (*a*).

V. THE COURTS OF THE COMMISSIONERS OF SEWERS.—These tribunals were originally erected by virtue of a commission under the great seal pursuant to the Statute of Sewers (23 Hen. VIII. c. 5); which statute was subsequently amended by the 13 Eliz. c. 9, and (in more recent years) by the 3 & 4 Will. IV. c. 22; 4 & 5 Vict. c. 45, and 12 & 13 Vict. c. 50 (*b*). Under these statutes, the powers of the Commissioners are confined to such county or particular place as the commission names; and their jurisdiction extends to overlooking the repairs of the banks and walls as well of the sea-coast as of navigable rivers,—(and, with the consent of a certain proportion of the owners and occupiers, to the making of new embankments),—and also to the cleansing of all navigable rivers and

(*z*) *Vide infra*, p. 360.

(*b*) *Callis on Sewers; Emerson v.*

(*a*) 36 & 37 Vict. c. 66, s. 45; 47 & 48 Vict. c. 61, s. 23; Rules of the Supreme Court, 1883, Ord. lix. r. 1; also, rr. 9 to 17 Dec. 1885; and 57 & 58 Vict. (c. 16, s. 1, sub-s. (5)).

Saltmarche, 7 Ad. & Ell. 266; *Taylor v. Loft*, 8 Exch. 269; *The Queen v. Baker*, Law Rep., 2 Q. B. 621.

of the streams communicating therewith. The City of London has a separate Commission of Sewers under the 7 Anne, c. 9 ; and there are also special statutes regulating the sewers in the metropolis (*c*).

[The commissioners of sewers are a court of record, and consequently may fine and imprison for contempt (*d*) ; and in the execution of their duty, they may proceed either by jury, or upon their own view ; and they may take order for the removal of any annoyances, or for the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Rómney-marsh or otherwise at their own discretion (*e*). They may also assess such rates, or scots, upon the owners of lands within their district as they shall judge necessary ; and, in case of refusal to pay, they may levy the same by distress of the goods and chattels, or by sale of the lands of such owners (*f*).]

By the statute 24 & 25 Vict. c. 133,—an Act passed chiefly with reference to the drainage of land for agricultural purposes, provision has been made for the constitution, with the consent of the inclosure commissioners, of *elective drainage districts* throughout the country, and for vesting all matters of drainage (within each district) in a board having the same powers as the commissioners of sewers,—but so that no such district be made within the limits of

(*c*) 18 & 19 Vict. c. 120, ss. 146—148 ; 21 & 22 Vict. c. 104, s. 1 ; 25 & 26 Vict. c. 102, ss. 1, 2—6, 22, 44—57, 59, 61, 66, 68, 69 ; 32 & 33 Vict. c. 102 ; 51 & 52 Vict. c. 41.

(*d*) *Inhabitants of Oldbury v. Stafford*, 1 Sid. 145.

(*e*) Romney-marsh, in the county of Kent, a tract containing 24,000 acres, is governed by certain antient and equitable laws of

sewers, composed by Henry de Bathe, a venerable judge in the reign of King Henry the Third. (4 Inst. 276.)

(*f*) 23 Hen. 8, c. 5 ; 3 & 4 Will. 4, c. 22 ; 4 & 5 Vict. c. 45 ; 12 & 13 Vict. c. 50, ss. 2, 7 ; 24 & 25 Vict. c. 133, s. 38 ; *Griffiths v. Longden Drainage Board*, L. R., 6 Q. B. 738 ; *The Queen v. Commissioners for Essex*, 14 Q. B. D. 561.

any commission of sewers, or of any borough or district under a local board of health, or improvement commissioners, without the consent of the commissioners, council, or board, as the case may be (*g*) ; and it is made lawful for Her Majesty, upon the recommendation of the inclosure commissioners, to direct commissions of sewers into all parts of England, *inland* as well as maritime, and to assign as the limits for their jurisdiction any areas which, having regard to facilities for draining, may be thought the most expedient ; and it is enacted, that the powers of the commissioners shall extend not only to the maintenance and improvement of existing works with reference chiefly to sewers and other *watercourses*, outfalls, and defences against water (*h*), but also to the construction of new works ; but where land requires to be purchased for new works otherwise than by agreement with the owner thereof, the commissioners must obtain the sanction of parliament (*i*) ; and other provisions are made for ensuring due compensation to owners whose property is interfered with for the purposes of the Act (*k*). Also,—by the Brine Pumping (Compensation for Subsidence) Act, 1891 (54 & 55 Vict. c. 40), a board of commissioners has been incorporated, for every compensation district to be formed under the provisions of that Act, for the purpose of awarding compensation for subsidence damage to lands and buildings occasioned by the withdrawal of the support of the brine thereto ; and the commissioners have certain of the powers of a court, and may also levy rates for providing the compensation awarded,—the whole administration of the Act being, however, placed under the control of the Local Government Board.

(*g*) 24 & 25 Vict. c. 133, s. 63 ; through which water flows.”
38 & 39 Vict. c. 55, s. 327. (Sect. 3.)

(*h*) *Watercourse* in this Act includes “ all rivers, streams, drains, sewers, and passages” (i) 24 & 25 Vict. c. 133, ss. 22—26.

(*k*) Sects. 18 *et seq.*

The Commissioners of Sewers, although a court of great antiquity and invested with an extensive and somewhat arbitrary jurisdiction, is yet but an inferior court, and as such is amenable to the superior guidance of the Queen's Bench Division of the High Court of Justice (*l*),—although at one time (*scil.*, in the reign of James the First) it was contended that it was subject only to the king in council.

VI. THE COUNTY COURTS.—The disuse into which the contentious jurisdiction of the sheriff's county court gradually fell, was chiefly owing to the dilatory and expensive character of its proceedings, as applied to the recovery of demands of small amount; and as the remedy afforded by the superior courts was, in this respect, still more objectionable, this state of things gave rise, long ago, to the formation of courts *of request* or *of conscience* (as they were indifferently called) in various parts of the kingdom: but these local courts proving in their turn inadequate to the purpose,—chiefly because their jurisdiction was confined to sums of too trivial an amount, and extended only to particular places and to small districts (*m*),—therefore, in the year 1846, and by the 9 & 10 Vict. c. 95, the modern county court was established; and the jurisdiction originally conferred on this new tribunal has been since largely increased, and is still yearly increasing, in a variety of directions. Of the jurisdiction thus established, and of the statutes subsequently passed for its extension, a short account shall here be

(*l*) *Smith's Case*, 1 Ventr. 66; *The Case of Cardiff Bridge*, Salk. 146; *Hetley v. Boyer*, Cro. Jac. 336; 36 & 37 Vict. c. 66, s. 45; Rules of the Supreme Court, 1883, Ord. lix. r. 1.

(*m*) The several courts of *con-*

science or *of request* in existence at the date of the 9 & 10 Vict. c. 95, were (in effect) abolished (subject only to a few exceptions) by that statute, and the Order in Council 1847, which was subsequently issued under its authority.

given (*n*), it being premised that all the County Court Acts prior to 1888 have now been consolidated in the County Courts Act, 1888 (51 & 52 Vict. c. 43).

The Act of 1846 directed that these new courts should be established in such counties as her Majesty in council should think fit (*o*); and by an order in council of the 9th March, 1847, and by authority of the Lord Chancellor under a subsequent Act (*p*),—a certain number of county court *districts* have been appointed; and in some convenient place or places in each of the districts so appointed (*q*), the court for that county is held once in every calendar month, or oftener as may be required (*r*); and the county court is constituted a court of record (*s*). The county court districts are grouped in unequal numbers in a variety of circuits (*t*); and to each circuit is assigned a judge, chosen by the Lord Chancellor

(*n*) These amending Acts were 12 & 13 Vict. c. 101; 13 & 14 Vict. c. 61; 15 & 16 Vict. c. 54; 19 & 20 Vict. c. 108; 20 & 21 Vict. c. 36; 21 & 22 Vict. c. 74; 22 Vict. c. 8; 28 & 29 Vict. c. 99; 29 & 30 Vict. c. 14; 30 & 31 Vict. c. 142; 38 & 39 Vict. c. 50; 45 & 46 Vict. c. 57; and 50 & 51 Vict. c. 3,—all which amending Acts (together with the principal Act, 9 & 10 Vict. c. 95) have been repealed by the County Courts Act, 1888 (51 & 52 Vict. c. 43). There are also the following County Courts Acts (still unrepealed), namely, the 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51 (conferring jurisdiction in Admiralty); the 36 & 37 Vict. c. 52 (small intestacies); and the 45 & 46 Vict. c. 31 (the Inferior Courts Judgments Extension Act, 1882).

(*o*) 9 & 10 Vict. c. 95, s. 1. The courts of the universities of Oxford and Cambridge (hereinafter dealt with) were exempted from the Act; and this exemption is continued by the 51 & 52 Vict. c. 43, s. 176.

(*p*) 21 & 22 Vict. c. 74.

(*q*) 9 & 10 Vict. c. 95, s. 2; 51 & 52 Vict. c. 43, s. 10.

(*r*) In some of the smaller districts, the court is held only once in every two or every three months; while in other districts, the court sits at several times during the month, according to the exigency of business.

(*s*) 51 & 52 Vict. c. 43, s. 5, re-enacting 9 & 10 Vict. c. 95, s. 3.

(*t*) For the circuit which includes the district of Liverpool, there are two judges.

from amongst the serjeants, queen's counsel, and barristers-at-law of seven years' standing and upwards (*u*) ; and for each district, there is a registrar (*x*), with clerks and subordinate officers, including a high bailiff and assistant bailiffs (*y*).

Such being the general constitution of the County Courts, we shall now proceed to consider the practice thereof and the procedure therein, although very concisely, referring the student and practitioner for fuller details to the provisions contained in the County Courts Act, 1888, and to the rules of 1889 made thereunder (*z*).

And firstly, as regards the choice of the court in which the plaintiff is to sue, or bring his plaint,—it is provided, that the plaintiff may enter his claim in the county court within the district of which the defendant shall dwell or carry on business at the time of bringing the action (*a*),—or (by leave of the judge or registrar, to be granted or not at his discretion) in the county court within the district of which the defendant shall have dwelt or carried on business within the six calendar months next preceding,—

(*u*) The judge is allowed to appoint a deputy (being a barrister of seven years' standing) in case of his own illness or unavoidable absence. (See 51 & 52 Vict. c. 43, s. 18, re-enacting 9 & 10 Vict. c. 95, s. 20 ; 19 & 20 Vict. c. 108, ss. 6—11.)

(*x*) The registrar (who must be a solicitor of five years' standing) is appointed by the judge, subject to the approval of the Lord Chancellor ; and a deputy registrar may (subject to the approval of the judge) be appointed by the registrar (51 & 52 Vict. c. 43, ss. 25, 29, 31).

(*y*) See 51 & 52 Vict. c. 43, ss. 33

—37, re-enacting 9 & 10 Vict. c. 95, ss. 3, 9, 23, 24, 31 ; 19 & 20 Vict. c. 108, ss. 6—17.

(*z*) The Rules of 1889 came into force on the 1st Feb. 1889 ; and they have been variously altered and amended by further County Court Rules which respectively came into operation in December, 1889, in March and October, 1892, in May, 1895, in June, 1896, and in December, 1896. But all these later Rules are to be cited as the Rules of 1889.

(*a*) As to the *metropolitan* districts, see 51 & 52 Vict. c. 43, s. 84, re-enacting 19 & 20 Vict. c. 108, s. 18 ; 30 & 31 Vict. c. 142, s. 3.

or (by the like leave) in the county court within the district of which the cause of action wholly or in part arose, without regard to the place of residence or business of the defendant (*b*). But as regards actions relating to mortgages on lands, and to the partition of lands, the court is to be that of the district within which the lands are situate (*c*) ; and as regards actions relating to the administration of the estates of deceased persons, the court is to be either that of the domicile of the deceased or that of the district in which his executors or administrators reside (*c*). Proceedings under the Trustee Acts, 1893, 1894, are to be taken in the court within the district of which the persons making the application reside, while in partnership matters they are to be taken in the district where the partnership business was or is carried on. But in any of the above cases the court has power to transfer the action or proceedings if it is shown that the same could be more conveniently heard in some other court.

Secondly, as regards the kinds and classes of action which may be brought in the county courts,—the jurisdiction conferred on these courts is, primarily and principally, for the recovery of small debts and demands ; and such jurisdiction includes generally all personal actions where the debt, damage, or demand claimed is not more than 50*l.*, whether on balance of account or otherwise (*d*). But if the plaintiff's claim exceeds 20*l.* in an action on any contract, or 10*l.* in any action of tort, the defendant may object to the county court dealing with the action ;

(*b*) 51 & 52 Vict. c. 43, s. 74 ;
Reg. v. Turner, [1897] 1 Q. B. 445.

(*c*) 51 & 52 Vict. c. 43, s. 75.

(*d*) *Ibid.* ss. 56, 57, re-enacting
9 & 10 Vict. c. 95, s. 58 ; 13 &
14 Vict. c. 61 ; 19 & 20 Vict.
c. 108, s. 24. As to the action of
replevin, see 51 & 52 Vict. c. 43,
ss. 133—137, re-enacting 9 &

10 Vict. c. 95, s. 119 ; 19 & 20 Vict.
c. 108, s. 66 ; and as to the re-
covery of small tenements, see
51 & 52 Vict. c. 43, s. 138 (where
term expired or duly determined
by notice to quit), and ss. 139—143
(where action is for non-payment
of rent).

and in such a case, on his giving the prescribed security and obtaining the judge's certificate that some important question of law or of fact is likely to arise, he may have a stay of the proceedings in the county court (*e*). However, actions of ejectment may also, in certain cases, be brought in the county court, that is to say, where neither the value nor the rent of the tenement exceeds 50*l.* (formerly 20*l.*) by the year,—although in this case the defendant may remove the action into the High Court, under an order of the High Court to be obtained by him for the purpose, on the ground that the title to lands of greater annual value than 50*l.* will be affected by the decision (*f*). And besides these actions of ejectment, being “actions for the recovery of *land*,” the county court has jurisdiction to make orders for the recovery of the *possession* of land, that is to say, in actions known as “actions for the recovery of possession,” brought by landlords, where neither the value nor the rent of the premises exceeds 50*l.* by the year, in the two following groups of cases, that is to say,—(1) Where the tenancy has either expired or has determined by notice to quit, and the tenant, or any person holding or claiming by through or under him, neglects or refuses to give up possession; and (2) Where the rent is one-half year in arrear, and the landlord has a right by law to re-enter for the non-payment thereof (*g*). Also, actions in which the title to any corporeal or incorporeal hereditament comes in question, may (subject to the same limit of 50*l.*) be tried in the county court (*h*);

(*e*) 51 & 52 Vict. c. 43, s. 62, re-enacting a similar provision in 19 & 20 Vict. c. 108, s. 39.

(*f*) 51 & 52 Vict. c. 43, s. 59, re-enacting 9 & 10 Vict. c. 95, s. 58; and 30 & 31 Vict. c. 142, ss. 11, 12; and see *Brown v. Cocking*, Law Rep. 3 Q. B. 672; *Tomkins v. Jones*, 22 Q.B.D. 599; *Howorth v.*

Sutcliffe, [1895] 2 Q. B. 358; *Bassano v. Bradley*, [1896] 1 Q. B. 645.

(*g*) 51 & 52 Vict. c. 43, ss. 138, 139, and Order V., r. 3.

(*h*) 51 & 52 Vict. c. 43, s. 60, re-enacting 9 & 10 Vict. c. 95, s. 58; and see *Pearson v. Glazebrook*, Law Rep. 3 Exch. 27.

and in any action in which the title to any corporeal or incorporeal hereditament, or to any *toll*, *fair*, *market*, or *franchise*, comes incidentally in question, if in such a case both parties consent, the judge may decide the claim which is the principal (or immediate) object of the action; and if he does so, then the decision on the incidental question of title is not to be evidence of title in any other action (*i*). But save as aforesaid, the county court has no jurisdiction (save by consent) in ejectment, or in actions involving title to corporeal or incorporeal hereditaments (*k*); also, the court has no jurisdiction in actions for libel, slander, seduction, or breach of promise of marriage (*l*); and no action may be brought in the county court on any judgment of the High Court (*m*). And as regards the jurisdiction by *consent*, it is provided by sect. 64 (as regards all common law actions whatsoever, as distinguished from equitable actions), that if both the parties agree *in writing* to give the county court jurisdiction, the agreement being signed either by them or by their solicitors, the county court shall have jurisdiction accordingly, and the action shall be then tried (*n*),—and by sect. 114, as regards all actions whatsoever commenced in the county court, and in which that court (save by consent, where consent is available to give jurisdiction) has no jurisdiction, the court is to dismiss the action, and only to that extent (and for the purpose of determining as to the costs) the court has jurisdiction.

By the 51 & 52 Vict. c. 43, s. 66, re-enacting a similar provision in the 30 & 31 Vict. c. 142, s. 10, the defendant in any action in the High Court for malicious prosecution,

(*i*) 51 & 52 Vict. c. 43, s. 61.

(*m*) 51 & 52 Vict. c. 43, s. 63.

(*k*) *Tomkins v. Jones*, 22 Q. B. D. 599.

(*n*) *Wadsworth v. Queen of Spain*, 20 L. J. Q. B. 493; *Foster v. Usherwood*, 3 Exch. D. 1.

(*l*) 51 & 52 Vict. c. 43, s. 56, re-enacting 9 & 10 Vict. c. 95, s. 58.

illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other tort, may, upon affidavit that the plaintiff has no visible means to pay the costs of the action, obtain an order of the High Court removing the action into the county court, unless the plaintiff gives security for the costs of the action, or satisfies the judge of the High Court that the action is one proper to be tried in the High Court (*o*).

In order to utilize more fully the county courts in cases proper to be there tried, it has now, for the first time, been provided, that in any action *of contract*, brought in the High Court wherein the claim endorsed on the writ does not exceed 100*l.* (formerly 50*l.*), or where such claim, though it originally exceeded that amount, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding that amount, a judge of the High Court may, on the application of either party at any time, order the action to be tried in any county court; and, in fact, unless there is good cause to the contrary, the judge is required to make such order (*p*). Actions of contract and of tort which have been thus remitted from the High Court to the county court remain in the High Court until the plaintiff has lodged with the registrar of the county court the order, the writ, copies of the affidavits on which the order was made, and a statement of the names and addresses of the parties and their solicitors, and particulars of claim. Until this has been done the action remains in the High Court; but when once this has been done the remitted action becomes a county court action, and the

(*o*) *Craven v. Smith*, Law Rep., 4 Exch. 146; *Grey v. Wish*, *ib.* 4 Q. B. 175; *Lewis v. Sanderson*, *ib.* 330; *Sampson v. Mackay*, *ib.* 643.

(*p*) 51 & 52 Vict. c. 43, s. 65, re-enacting a somewhat similar provision in 19 & 20 Vict. c. 108, s. 26; and see *Scutt v. Freeman*, 2 Q. B. D. 177; *Curtis v. Stovin*, 22 Q. B. D. 513.

jurisdiction of the High Court ceases absolutely (*q*). With the same view, and in order also to penalize persons who bring actions in the High Court which are proper to be tried in the county court, it has been further provided, that, if in any action in the High Court the plaintiff shall recover a sum less than 20*l*. (if the action be founded on contract), or 10*l*. (if founded on tort), he shall not be entitled to any costs of the action; and if he recover a sum of 20*l*., but less than 50*l*. (on contract), or a sum of 10*l*., but less than 20*l*. (on tort), he shall be entitled only to county court costs of action,—unless the judge certifies that there was sufficient reason for bringing the action in the High Court, or unless the Court or a judge at chambers shall, by order, allow such costs (*r*). But if in such a case, the action being founded on contract, the plaintiff within twenty-one days after the service of the writ obtains an order under Order XIV. rule 1, to enter up judgment for a sum of 20*l*. or upwards, he is to be entitled to his costs according to the scale for the time being in use in the High Court. Also, by the 47 & 48 Vict. c. 61, s. 17, interpleader proceedings in the High Court, when the amount or value of the matter in dispute does not exceed 500*l*., may, at the discretion of the judge of the High Court, be transferred into the county court, and the transfer is to have the same effect as a transfer under sect. 8 of the County Courts Act, 1867 (now sect. 69 of the County Courts Act, 1888), which (as hereinafter more particularly mentioned) provides for the transfer of certain classes of equitable actions from the High Court

(*q*) *D'Errico v. Samuel* (No. 1), [1896] 1 Q. B. 163; *Duke v. Davis*, [1893] 2 Q. B. 260.

(*r*) 51 & 52 Vict. c. 43, s. 116, re-enacting (with amendments) a somewhat similar provision in 30 & 31 Vict. c. 142, s. 5; and see 51 & 52 Vict. c. 43, s. 117, re-enacting

30 & 31 Vict. c. 142, s. 29, which contained a similar enactment with regard to actions brought unnecessarily in inferior courts (other than the county court) and in which less than 10*l*. was recovered.

into the county court. And in order to still further encourage the prosecution of actions in the county court, it is provided, by sect. 119 of the County Courts Act, 1888, re-enacting a similar provision in the 45 & 46 Vict. c. 57, that the judge of that court may in any proper case, and irrespectively of the amount recovered, award costs on a higher scale than that which would otherwise be applicable, —provided he certify that the action involved a novel or difficult point of law, or that the question litigated was of importance to some class or body of persons, or was of general or public interest.

Regarding the mode of proceeding in the county courts, while referring the reader to the rules themselves regulative of that practice, we may here give the following brief outline of the procedure :—The first step in the proceedings is to enter a *plaint* in a book kept by the registrar for the purpose (*s*), and thereupon a *summons* to be served on the defendant is issued ; and on the day in that behalf named in the summons, the plaintiff appears to support his claim, and the defendant appears to make his defence, and otherwise the plaintiff, on proving his case in court, shall have judgment. If the plaintiff should (by leave in that behalf) have issued a *default summons*, then, unless the defendant gives notice of defence, the plaintiff, at the end of eight (formerly sixteen) days from the time of service, may sign judgment without further proof (*t*). But the defendant, assuming that he has any special defence, will, of course, give notice of it, and (if he intends to rely upon it) he must give notice of it,—that is to say, if he intends to set off or set up (by way of counterclaim) any debt or demand, or to set up (by way of defence) the fact of infancy, coverture, the statute of limitations, or discharge in

(*s*) 51 & 52 Vict. c. 43, s. 73,
re-enacting 9 & 10 Vict. c. 95,
s. 59.

(*t*) 51 & 52 Vict. c. 43, s. 86.

bankruptcy (*u*); and on the case being called on, the judge proceeds in a summary way to try it, and gives judgment upon such evidence—taken *vivâ voce* and upon oath—as the parties on either side shall adduce, it being provided, that the judge, at the hearing, shall himself determine all questions, as well of fact as of law, unless a jury shall be summoned (*x*). But when the amount claimed exceeds 5*l.*, a jury shall be summoned, at the requisition of either plaintiff or defendant; and even where it does not exceed 5*l.*, a jury may be summoned at the discretion of the judge, on the application of either of the parties (*y*),—such jury (in either case) to consist of five persons qualified to serve as jurors at the trial of issues of fact arising in actions pending in the High Court of Justice; and the jury must be unanimous in their verdict (*z*).

When the judge at such hearing adjudges a sum of money to be paid by one party to the other by instalments or otherwise, and the order for payment is not complied with, execution may issue against the goods of the judgment debtor (*a*); and under the Debtors Act, 1869 (32 & 33 Vict. c. 62), if such debtor has the means to pay at the date of the judgment, or at any time afterwards, and fails to do so,—he may, on his ability to pay being established to the satisfaction of the judge, be committed to prison for any period not exceeding six weeks, though he may obtain his liberty at any time by paying the sum ordered,—the mode of proceeding to obtain his committal being to issue a *judgment summons*, requiring him to show cause why he does not pay the sum for which the

(*u*) 51 & 52 Vict. c. 43, s. 82,
re-enacting 9 & 10 Vict. c. 95.
s. 76.

(*x*) 51 & 52 Vict. c. 43, ss. 79,
100, re-enacting 9 & 10 Vict. c. 95,
s. 69.

(*y*) 51 & 52 Vict. c. 43, s. 101,

re-enacting 9 & 10 Vict. c. 95,
s. 70.

(*z*) 51 & 52 Vict. c. 43, s. 102,
re-enacting 9 & 10 Vict. c. 95,
ss. 72, 73.

(*a*) 51 & 52 Vict. c. 43, s. 146.

judgment was obtained ; or if such sum was ordered to be paid by instalments, why he does not pay the instalments ; and on the hearing of the *judgment summons*, a new order may be made as to the mode of payment of the sum for which the judgment was obtained, if the judge shall think fit to vary his original order ; but no second commitment can be made in respect of the same default (*b*) ; and by the 51 & 52 Vict. c. 43, s. 153, for inability to pay the judgment, or any instalment, when such inability arises from sickness or other sufficient cause, the judge may suspend the judgment, and may even discharge the debtor. A committal order can, however, only be made by a judge or his deputy (*c*).

This jurisdiction of the county court under the Debtors Act, 1869, now extends also to enforcing any judgment, whether of the High Court or of the county court in which proceedings to enforce it are taken, or of any other county court, or of any inferior court, and whatever may be the amount of the judgment (*d*). But upon the application to commit, divers objections are, of course, available for the debtor ; also, the court may decline to commit, and may (with the consent of the judgment creditor) make a receiving order against the debtor ; or if it appears to the court that the liabilities of the debtor do not exceed 50*l.*, the court may make an administration order under s. 122 of the Bankruptcy Act, 1883, in lieu of a receiving order.

The execution of the judgment of one county court, against the debtor within the district of another county court in England, may be effectuated by such other court, provided it have received, and duly sealed with its own seal, the warrant (duly attested) of the first county court to proceed to such execution (*e*) ; and if a judge of the

(*b*) *Evans v. Wills*, 1 C. P. D. 229.

(*c*) 32 & 33 Vict. c. 62 ; 41 & 42 Vict. c. 54.

(*d*) Bankruptcy Act, 1883, s. 103 (4).

(*e*) 51 & 52 Vict. c. 43, s. 158.

High Court is satisfied that the debtor has no *goods or chattels* convenient to satisfy the judgment obtained in the county court, he may order a writ of *certiorari* to issue for the removal of the judgment into the High Court, for the purposes of execution against the *lands* of the debtor or otherwise (*f*) ; also, by the Inferior Courts (Judgments Extension) Act, 1882 (45 & 46 Vict. c. 31), the judgment of a county court in England may be executed in any other part of the United Kingdom by the corresponding court in such other place, provided a certificate of the judgment be first registered in such other corresponding court.

But it is competent to the judge, after having given his decision, to accede, if he so think fit, to an application for a new trial, upon such terms as he thinks reasonable (*g*) ; and in the meantime to stay the proceedings. But the judge can only grant a new trial on grounds which would in the High Court be deemed sufficient for granting it (*h*). No appeal lies from the finding of any *fact* by the judge (*i*) ; but if either party to the action is dissatisfied with the determination or direction of the judge in point of *law* or *equity*, or upon the admission or rejection of any *evidence*, the party dissatisfied may, if the point of law has been taken before the county court judge, and not otherwise (*k*), appeal to the High Court (*l*), in such mode (*scil.* by motion on notice) as is for the time being provided in that behalf by the rules of the High Court of Justice (*m*),—which appeal is to a divisional court of the Queen's Bench

(*f*) 51 & 52 Vict. c. 43, s. 151.

(*g*) *Ibid.* s. 93, re-enacting 9 & 10 Vict. c. 95, s. 89.

(*h*) *Murtagh v. Barry* (1890), 24 Q. B. D. 632.

(*i*) *Cousins v. Lombard Bank*, 1 Ex. D. 401.

(*k*) *Wohlgemuthe v. Coste*, [1899] 1 Q. B. 501.

(*l*) *Warner v. Riddelford*, 4 C. B.

(N.S.) 180 ; *Carr v. Stringer*, 1 Ell. Bl. & Ell. 123 ; *Stone v. Dean*, *ib.* 504 ; *Waterton v. Baker*, Law Rep., 3 Q. B. 173 ; *Gage v. Collins*, *ib.* 2 C. P. 381 ; *Francis v. Dowdeswell*, *ib.* 9 C. P. 423 ; *Turner v. Great Western Railway Company*, 2 Q. B. D. 125 ; *Mayer v. Turner*, 3 Ex. D. 235.

(*m*) 51 & 52 Vict. c. 43, s. 120.

Division (*n*) ; but no appeal will lie, if both parties shall have agreed in writing before the decision is pronounced that the decision of the judge shall be final (*o*) ; and there is in no case (unless by special leave of the judge) any right of appeal, in an action of contract or tort (other than in ejectionment or in actions involving title to land), where the debt or damage claimed does not exceed 20*l.* ; nor in any action of replevin, where the amount of the rent or the value of the goods does not exceed 20*l.* ; nor in any action for the recovery of tenements, where the yearly rent or value does not exceed 20*l.* ; nor in interpleader proceedings, where the money claimed or the value of the goods does not exceed 20*l.* (*p*).

The scope of the county courts was at first confined, with regard to their ordinary and litigious jurisdiction, to such matters as could be concurrently brought in one of the superior courts in which law was administered as distinct from equity ; but as the convenience of the county courts became more appreciated, the opinion gained ground, that it would be desirable to confer on them a jurisdiction also in cases involving questions of *equity* where comparatively small interests were involved, and which would otherwise have to be entertained, if at all, through the expensive and dilatory method of chancery proceedings ; and for this purpose, there was passed, in the year 1865, the 28 & 29 Vict. c. 99, entitled “An Act to confer on the County Courts a limited Jurisdiction in Equity.” That statute has since been repealed, and its provisions (with certain amendments) re-enacted by the County Courts Act, 1888 ; and under the last-mentioned Act (*q*), the county court

(*n*) 36 & 37 Vict. c. 66, s. 45 ; Rules of Supreme Court, 1883, Order lix. rules 4—8 ; and the further rules 9 to 17, issued in December, 1885 ; 51 & 52 Vict. c. 43, ss. 121, 122.

(*o*) 51 & 52 Vict. c. 43, s. 123, re-enacting 19 & 20 Vict. c. 108, s. 69.

(*p*) 51 & 52 Vict. c. 43, s. 120.

(*q*) *Ibid.* s. 67 ; 28 & 29 Vict. c. 99, s. 1.

has now (concurrently with the High Court) (*r*), all the powers and authority of the High Court of Justice itself in the following matters of equity, that is to say :— (1.) Administration suits, wherein the estate does not exceed in value the sum of 500*l.* (*s*) ; (2.) Suits for the execution of trusts, where the estate or fund does not exceed the same amount (*t*) ; (3.) Foreclosure and redemption suits and suits for enforcing any charge or lien, where the mortgage, charge, or lien shall be within such limit ; (4.) Suits for the specific performance (or for the rectification) of agreements, where the property sold or leased does not exceed that amount in value (*u*) ; (5.) Proceedings under the Trustee Relief Acts (or now the Trustee Act, 1893), with a similar qualification as to the value of the property ; (6.) Proceedings as to the maintenance or advancement of infants,—with a similar qualification ; (7.) Suits for the dissolution or winding-up of partnerships,—the assets not exceeding such amount ; and (8.) Actions for relief against fraud or mistake, in which the damage sustained, or the estate or fund in respect of which relief is sought, does not exceed 500*l.* (*x*). Also, by sect. 69 of the County Courts Act, 1888, re-enacting sect. 8 of the County Courts Act, 1867, the High Court in its Chancery Division may, on the application of any party to the action proceeding therein, or *mero motu*, order a transfer of such action into the county court, provided it be one within the jurisdiction of the county court as above defined ; and thereafter the action proceeds in the county court precisely as if it had been originally commenced therein. And it is provided,

(*r*) *Brown v. Rue*, Law Rep., 17 Eq. Ca. 343.

(*s*) *Turner v. Rennoldson*, Law Rep., 16 Eq. Ca. 37.

(*t*) *Clayton v. Renton*, Law Rep., 4 Eq. Ca. 158.

(*u*) *Wilson v. Marshall*, Law Rep., 3 Eq. Ca. 270.

(*x*) By 51 & 52 Vict. c. 43, s. 71, re-enacting 30 & 31 Vict. c. 142, s. 26, any money paid into a county court in equitable proceedings is to be invested by the registrar, within forty-eight hours, in the post-office savings bank of the town.

by sect. 68 of the County Courts Act, 1888, that if, during the progress of an action proceeding in the county court on its equitable side, it appears that the limit of that court's jurisdiction is exceeded, the judge of the county court shall transfer the action (as regards its subsequent stages), to the High Court, Chancery Division ; or either party may obtain an order of the Chancery Division directing the continued prosecution of the action in the county court, notwithstanding the excess of the jurisdiction.

In the year 1868, the policy of increasing the jurisdiction of the county courts received a still further development, by conferring upon such of them as are held in the neighbourhood of the sea a limited jurisdiction in admiralty ; and this was carried into effect by the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), amended by the County Courts Admiralty Jurisdiction Act, 1869 (32 & 33 Vict. c. 51) (*y*) ; and by the Admiralty Jurisdiction Act, 1868, it was provided, that the machinery for appointing county courts for admiralty purposes should be by Orders in Council from time to time as the needs for such courts arose (*z*).

The jurisdiction conferred by the Admiralty Jurisdiction Acts just referred to extends to the following matters of admiralty, that is to say :—

(1.) *Salvage*.—Any cause in which the value of the property does not exceed 1000*l.*, or in which the amount claimed does not exceed 300*l.* (*a*) ; and within these limits, the admiralty jurisdiction of the county court is the same as that of the High Court. The county court has also, within the same limits, jurisdiction under the Merchant Shipping Act, 1894, with reference to salvage for saving

(*y*) *Hewitt v. Cory*, Law Rep., 5 Q. B. 418.

(*z*) Such Orders in Council have been made from time to time, and a list of county courts now having

admiralty jurisdiction by virtue of such orders will be found at p. 520 of the Yearly County Court Practice for 1899.

(*a*) 31 & 32 Vict. c. 71, s. 3 (1).

life, salvage of cargo or wreck, the determination of salvage disputes, and the apportionment of salvage, in case of dispute, when ascertained (*b*).

(2.) Towage, necessities or wages.—All claims not exceeding 150*l.* (*c*) ; and subject to that limitation, the jurisdiction is in these matters also the same as that of the High Court.

(3.) Damage to cargo or by collision.—As regards damage to cargo, the county court has jurisdiction over claims not exceeding 300*l.* (*d*). In cases of damage to cargo by collision, proceedings in the county court may be either *in rem* or *in personam*, though in the High Court the jurisdiction is only *in personam* (*e*). And with reference to damage by collision, by the combined effect of the Acts of 1868 (*f*), and 1869 (*g*), the jurisdiction of the county court extends to any claim for damage by collision, and any claim for damage to ships, whether by collision or otherwise, within the limit of 300*l.* But, of course, no wider jurisdiction over claims for damage by or to ships is thereby conferred than is possessed by the High Court (*h*).

(4.) Claims arising out of agreements in relation to the use or hire of any ship, or to the carriage of goods therein or out of any tort in relation to such goods, not exceeding 300*l.* (*i*).

(5.) Jurisdiction by agreement.—By agreement, a county court has jurisdiction over any of the above matters where the value of the property saved or amount claimed is beyond the prescribed limit, if the parties

(*b*) 57 & 58 Vict. c. 60, ss. 544, 546, 547—549, 556.

(*c*) 31 & 32 Vict. c. 71, s. 3 (2).

(*d*) *Ibid.* 3 (3).

(*e*) *The Victoria*, 12 P. D. 115.

(*f*) 31 & 32 Vict. c. 71, s. 3 (3).

(*g*) 32 & 33 Vict. c. 51, s. 4.

(*h*) *The Zeta*, [1893] A. C. 468 ;
Reg. v. City of London Court, [1892]
1 Q. B. 273.

(*i*) 32 & 33 Vict. c. 51, s. 2 (1).

agree, by a memorandum signed by them or by their solicitors or agents, that any county court having admiralty jurisdiction, and specified in the memorandum, shall have jurisdiction (*k*).

But the jurisdiction of the county courts in Admiralty matters is not to extend to any prize cause or to any other matter within the Naval Prize Act, 1864, or to any matter arising under the Acts for the suppression of the slave trade ; and it does not, in general, extend to any admiralty jurisdiction by way of appeal (*l*),—although, now, a limited appellate jurisdiction has been conferred upon county courts by the Merchant Shipping Act of 1894, that is to say : (1.) As courts of survey (*m*) ; (2.) As courts of appeal from pilotage authorities (*n*).

No county court, other than the county court appointed to have admiralty jurisdiction within any district, has jurisdiction in an admiralty cause within that district (*o*). This rule, however, only applies where it is necessary to resort to the special remedies, and to make use of the special powers, of the Admiralty Jurisdiction Acts of 1868 and 1869 ; for where there is no such necessity, there is nothing in those Acts which has impaired, or which interferes with, the old county court jurisdiction (*p*).

The Admiralty Jurisdiction Act, 1868, further makes provision in certain contingencies for the transfer of causes

(*k*) 31 & 32 Vict. c. 71, s. 3 ;
32 & 33 Vict. c. 51, s. 2 (2).

(*l*) 31 & 32 Vict. c. 71, s. 4.

(*m*) 57 & 58 Vict. c. 60, ss. 271,
275, 487, 488.

(*n*) Sect. 610. And see further, as to jurisdiction in these matters, the notes to the Merchant Shipping Act, 1894, in vol. ii. of the Yearly County Court Practice, 1899, p. 190.

(*o*) 31 & 32 Vict. c. 71, s. 5.

(*p*) A county court, not having Admiralty jurisdiction, can try (as a tort) an action to recover damages for injuries caused by collision between vessels up to the 50*l.* limit (*Scovell v. Beavan*, 19 Q. B. D. 428) ; or can try (as an action of contract) an action to recover freight under a charter party, within the same limit, (*Reg. v. Southend C. C. Judge*, 13 Q. B. D. 142).

between the High Court and county court, and between county courts, in order to facilitate the trial of such causes (*q*).

Special provision is also made as to the district in which admiralty causes shall be commenced (*r*), and certain special provisions as to procedure in such causes have also been laid down by rules made under the authority of the Admiralty Jurisdiction Act, 1868 (*s*). That Act, however, is to be read as one with the County Courts Act, 1888 (*t*); and the result is, that, where not necessarily excluded by the special procedure in admiralty causes, the ordinary county court practice and procedure apply (*u*).

An admiralty cause in a county court is heard and determined, and the judgment enforced, in the same way as in an ordinary civil action (*x*); but in admiralty causes, there is no right to a jury (*y*). *Nautical* assessors may be had, as of right, in cases relating to salvage, towage, or collision (*z*); and in any admiralty or maritime cause, the judge may, at the trial, be assisted by two *mercantile* assessors (*a*).

An appeal lies from an admiralty decision of the county court to a divisional Court of the Probate, Divorce and Admiralty Division of the High Court (*b*). But the provisions of the Admiralty Jurisdiction Act, 1868, with respect to appeals, must now be read subject to the general

(*q*) 31 & 32 Vict. c. 71, ss. 6, 7, and 8.

(*r*) *Ibid.* s. 21.

(*s*) *Ibid.* ss. 35, 36; and Order 39B of the County Court Rules, 1889, as modified by the Rules of May, 1899.

(*t*) *Ibid.* s. 34.

(*u*) *The Vulcan*, [1898] p. 222.

(*x*) 31 & 32 Vict. c. 71, ss. 10, 12, 13, 23; and Order 39B, rr. 1—3, 37—39.

(*y*) *The Theodora*, [1897] P. 79; *The Tynwald*, [1895] P. 142.

(*z*) 31 & 32 Vict. c. 71, ss. 10, 11; Order 39B, rr. 58—68, as modified by the County Court Rules of May, 1899.

(*a*) 32 & 33 Vict. c. 51, s. 5.

(*b*) 31 & 32 Vict. c. 71, s. 26; and s. 120 of the County Courts Act, 1888. Also Rules Supreme Court, Order lix. r. 4.

provisions of s. 120 of the County Courts Act, 1888 (*c*); and the result is, that an appeal lies, without leave, on a point of law, whether final or interlocutory, whatever the amount in question; but on questions of fact, an appeal lies,—(A) with leave, from a final order where the amount exceeds 50*l.*; and (B) with leave, from an interlocutory order when the amount exceeds 50*l.*; and security for costs must in both cases be given (*d*).

The procedure on appeal is either by instrument of appeal (*e*) or by motion (*f*). But, as in an ordinary county court action, an appeal may be precluded by previous agreement not to appeal in the prescribed form (*g*).

Also, in the year 1869, when the bankruptcy law was remodelled by the Bankruptcy Act, 1869 (*h*), the administration thereof was by that Act entrusted, except in the district of the London Court of Bankruptcy, to certain of the county courts (*i*); and this jurisdiction is continued in the county courts by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (*k*). When, in a bankruptcy proceeding in a county court, a question of law arises, it may, at the instance of all parties, or of one party and the judge, be sent to the High Court in the form of a special case stated

(*c*) *The Eden*, [1892] P. 7; *The Delano*, [1895] P. 40.

(*d*) 31 & 32 Vict. c. 71; ss. 26, 31.

(*e*) Under 31 & 32 Vict. c. 71, s. 27.

(*f*) Under County Courts Act, 1888, s. 120.

(*g*) 31 & 32 Vict. c. 71, s. 28; and *cf.* County Courts Act, 1888, s. 123.

(*h*) 32 & 33 Vict. c. 71.

(*i*) By s. 59, the court "having jurisdiction in bankruptcy" was defined to be (beyond the London

bankruptcy district) the county court of the district wherein the debtor resided or carried on his business; but by s. 79 the Lord Chancellor was enabled, by order, to exclude any county court from having jurisdiction in bankruptcy, and for the purpose of bankruptcy to attach its district to another county court. Districts were appointed by order of January 1st, 1870, and have been maintained, subject to alteration, under the Bankruptcy Act, 1883, s. 92.

(*k*) Sects. 92, 100, 102.

by the county court judge for determination in the first instance (*l*).

The registrars of a county court, having jurisdiction in bankruptcy, have had certain powers and jurisdiction in bankruptcy matters conferred upon them similar to those conferred on registrars in bankruptcy of the High Court ; and any order made by them is equivalent to an order of the court (*m*). But provision is made for an adjournment from the registrar to the judge (*n*). For the purposes of its bankruptcy jurisdiction, a county court has all the powers of a High Court (*o*).

Moreover, by virtue of its bankruptcy jurisdiction, a county court has power to decide all questions whatsoever, whether of law or of fact, which may arise in any bankruptcy case, or which the court may deem it expedient to decide for the purpose of doing complete justice or making a complete distribution of property in any such case (*p*); and in cases arising out of the bankruptcy there is no limit to such jurisdiction,—though the judge in his discretion should refuse to try cases in which questions of character or large amounts are involved (*q*) ; but as to questions between the trustee and strangers to the bankruptcy, the jurisdiction is limited to cases in which the amount in dispute does not, in the opinion of the judge, exceed 200*l.*, or where all parties consent (*r*).

The practice and procedure of the county court in exercising its bankruptcy jurisdiction are regulated by

(*l*) Bankruptcy Act, 1883, s. 97
(3).

(*m*) *Ibid.* s. 99. The appeal from registrar's order is direct to divisional court (*Re Maughan*, 21 Q. B. D. 21).

(*n*) Bankruptcy Rules, 1883—1890, r. 8.

(*o*) Bankruptcy Act, 1883, s. 100.

(*p*) Bankruptcy Act, 1883, s. 102 (1).

(*q*) *Re Beswick*, 5 Morr. 105.

(*r*) Bankruptcy Act, 1883, s. 102 (1): *Re Holt*, 58 L. J. Q. B. 5.

the Bankruptcy Acts, 1883 and 1890, and by the rules made thereunder.

The appeal from a county court in bankruptcy is to a divisional court,—whose decision is final, unless the court gives special leave to appeal to the Court of Appeal (*s*).

A limited jurisdiction has also been given to county courts to wind up companies by the Companies (Winding-up) Act, 1890 (*t*). By that Act, it is provided, that where the capital of a company paid up, or credited as paid up, does not exceed 10,000*l.*, and the registered office of the company is situate within the jurisdiction of a county court having jurisdiction under the Act, a petition to wind up the company, or to continue the winding up of the company under the supervision of the court, shall be presented in that county court (*u*).

The county courts having jurisdiction in the winding up are, broadly speaking, the same as those which have jurisdiction in bankruptcy (*x*) ; but the Act gives the Lord Chancellor power to add to, exclude, and alter the districts of the courts which are to exercise the winding-up jurisdiction (*y*). For the purposes of the jurisdiction in winding up, the county court has all the powers of the High Court,—the practice and procedure followed by the county court in exercising its jurisdiction being, generally that prescribed by the Companies Acts, 1862 to 1898, and particularly by the Companies (Winding-up) Act, 1890, and by the rules made thereunder ; but where no other provision is made by those Acts or rules, the practice shall, so far as practicable, be in accordance with the existing rules and practice of the county court in proceedings for the administration of assets (*z*).

(*s*) Bankruptcy Appeals (County Courts) Act, 1884, s. 2, amending s. 104 of the Bankruptcy Act, 1883.

(*t*) 53 & 54 Vict. c. 63.

(*u*) 53 & 54 Vict. c. 63, s. 1 (3).

(*x*) *Ibid.* s. 1 (5).

(*y*) *Ibid.* s. 1 (6).

(*z*) Winding-up Rules, 1890, 178.

By the Stannaries Court Abolition Act, 1896 *(a)*, the jurisdiction of the Stannaries Court was transferred to the county court of Cornwall holden at Truro. Under the Companies (Winding-up) Act, 1890, unlimited jurisdiction to wind up companies working mines within the Stannaries was given to the Stannaries Court, wherever the registered office of the company was situated *(b)*; and this unlimited jurisdiction is therefore now vested in the county court to which the jurisdiction has been assigned.

Any question arising in a winding-up proceeding in a county court may, at the instance of all parties, or of the judge and one of the parties, be first determined by the High Court on a special case stated by the county court judge *(c)*. There is, also, an appeal to the High Court, by motion, under sect. 120 of the County Courts Act, 1888 *(d)*.

Another important branch of the county court jurisdiction is that conferred by the statutes relating to employers and workmen. These Acts are the Employers and Workmen Act, 1875 *(e)*, the Employers' Liability Act, 1880 *(f)*, and the Workmen's Compensation Act, 1897 *(g)*,—the substantive provisions of all which Acts have been elsewhere sufficiently stated in this work; and as regards the practice or mode of procedure under these Acts, there are specific rules made under each Act regulative of that,—and where such rules are inapplicable, the ordinary procedure in the county court is available.

In addition to the jurisdictions already mentioned, the county courts exercise under particular statutes a very extensive jurisdiction of a more or less summary character;

(a) 59 & 60 Vict. c. 45.

(b) 53 & 54 Vict. c. 63, 1 Q. B. 248.

s. 1 (4).

(c) *Ibid.* s. 3 (3).

(d) *Re Ilkley Hotel Co.*, [1893]

(e) 38 & 39 Vict. c. 90.

(f) 43 & 44 Vict. c. 42.

(g) 60 & 61 Vict. c. 37.

and such jurisdiction is being yearly added to. Sometimes the jurisdiction is vested in the county court exclusively of all other courts ; and sometimes it is vested in the county courts concurrently with the High Court (and either subject to, or without being subject to, any limit to the jurisdiction) ; and sometimes it is vested in the county courts concurrently with the justices or the magistrates. It is difficult to classify the many miscellaneous matters which fall within this statutory jurisdiction ; but they include :—(1) As regards married women,—the decision of questions relative to their separate property, and the protection of their earnings ; (2) As regards infants,—orders as to their guardianship ; and (3) As regards lunatics,—orders for their reception into asylums (including urgency orders), and also orders as to the application of their property ; also, (4) As regards friendly societies, industrial and provident societies, and building societies,—the determination of disputes generally between the members and the respective societies, and as regards nominations by (and the small intestacies of) the members ; (5) As regards charities,—the hearing and disposal of various applications under the Charitable Trusts Act ; also (6) Recovery of penalties under the Pharmacy Acts, Government Annuities Act, 1882, and Hosiery Manufacture (Wages) Act, 1874 ; (7) Recovery of damages under the Riot Act, 1886, and of the expenses of extraordinary traffic under the Locomotives Act, 1898, s. 12 ; and of expenses under the Inclosures Act, 1868 ; and of compensation under the Army Act for impressment of carriages and vessels ; and under the Brine Pumping Act, 1891, for subsidence ; and of loans by way of relief under the Poor Law Amendment Acts ; (8) The settlement of disputes as regards small estates or intestacies under the Court of Probate Acts, 1857 and 1858 ; besides, also, various applications under (1) The Settled Land Acts and kindred Acts ; (2) The Tithe Acts ; and (3) The Agricultural Holdings Act and kindred Acts

relating to allotments and market gardens ; and applications (relative to the public health) under the Factories and Workshops Acts, the Alkali Acts, the Rivers Pollution Prevention Acts, and the Open Spaces and Commons Acts ; also applications under the Law of Distress Amendment Acts and the Customs Consolidation Act, 1876. And there are also certain duties (of a more or less exceptional character) imposed upon county court judges personally,—*e.g.*, under the Acts for the regulation of coal (and other) mines, and for the storage and carriage of explosives, and regarding inebriates (or habitual drunkards) (*h*).

VII. THE COURT OF THE STANNARIES OF CORNWALL AND DEVON (NOW BECOME MERELY THE COUNTY COURT FOR CORNWALL).—The Court of the Stannaries was originally established for the administration of justice among the tanners, within the two counties of Cornwall and Devon ; and the court was a court of record, and [was held before a judge called the vice-warden ; and the jurisdiction of the court was founded on an antient privilege granted to the workers in the tin mines, to sue and be sued in their own court,—so that they might not be drawn from their business, to their own private loss and to the public detriment, by attending their lawsuits in other courts (*i*). The privileges of the tanners were confirmed by a charter of the thirty-third year of Edward the First, and were fully expounded in a private statute which is set forth in the Institutes (*j*), and which was afterwards explained by a public Act, namely, the 16 Car. I. c. 15 ; and there were originally distinct courts for the two counties, but by later statutes, the two courts were

(*h*) All the Acts under which the county court has some special jurisdiction or administrative power will be found collected, classified, and annotated in vol. ii. of the

Yearly County Court Practice, 1899.

(*i*) 4 Inst. 232.

(*j*) *Ibid.*

[united into one court, and their procedure was regulated (*k*) ; and the court has now been converted into a county court (*l*),—or rather has been merged in the county court of Cornwall sitting at Truro ; and the procedure has been assimilated (more or less) to the procedure in the county courts, the winding-up jurisdiction being exerciseable only by such of the county courts as have jurisdiction in bankruptcy.

The jurisdiction of the Stannaries Court (or, now, the Stannaries Jurisdiction of the County Court of Cornwall) may be stated as follows :—All tanners and labourers in and about the stannaries, during the time of their working therein *bonâ fide*, may sue and be sued in this court, in all matters arising within the stannaries, excepting pleas of land, life, and member ;] and until the year 1846 (when the modern county courts were established as is hereinbefore mentioned), these persons, as regards all such matters, were privileged not to be sued in any other court than the stannaries court (*m*). However, since that year, they may, as regards all the same matters (not being matters of equitable jurisdiction) (*n*), be sued either in the stannaries court or in the county court of their district (*o*) ; and as regards causes of action arising outside the stannaries, they might always be sued either in the stannaries court or elsewhere (*p*).

(*k*) 6 & 7 Will. 4, c. 106 ; 2 & 3 Vict. c. 58 ; 11 & 12 Vict. c. 83 ; 18 & 19 Vict. c. 32 ; and especially the Stannaries Act, 1869 (32 & 33 Vict. c. 19), and the Stannaries Act, 1887 (50 & 51 Vict. c. 43) ; and see Carew's History of Cornwall ; Doderidge's History of Cornwall, p. 94 ; Bainbridge on Mines, 4th ed., by Brown, pp. 146—160, 175—187, 194—199 ; *Rowe v. Brenton*, 8 B. & C. 737 ; and

Harvey v. Gilbard, 1 W. W. & H. 552.

(*l*) 59 & 60 Vict. c. 45 ; and General Rules (Stannaries, Jurisdiction of), February, 1897.

(*m*) 4 Inst. 231 ; Com. Dig. Courts, L. 1.

(*n*) 51 & 52 Vict. c. 43, s. 177.

(*o*) *Newton v. Nancarrow*, 15 Q. B. 144.

(*p*) 4 Inst. 231.

As regards appeals from the court, these were formerly to the lord warden (assisted by two or more legal assessors) ; and there was a final appeal to the judicial committee of the privy council (*q*) ; but under the Judicature Acts, the jurisdiction and powers of the court of the lord warden assisted by his assessors, or of the lord warden sitting in his capacity of judge, were transferred to and vested in the Court of Appeal of the Supreme Court of Judicature (*r*),—and the appeal from the Stannaries Jurisdiction of the County Courts of Cornwall is still, *semble*, to the Court of Appeal,—although, as a matter of fact, these appeals are heard before divisional Courts of the High Court of Justice.

VIII. THE ECCLESIASTICAL COURTS.—These courts are inferior courts, but possessing a very special jurisdiction ; and both as regards their principles and the practice in them, they are guided (for the most part) by the rules of the civil and canon laws, these laws (as was before observed) having no force within this realm, save as admitted or recognised by the municipal law of England ; and except where and so far as their jurisdiction is recognised by the municipal law, these courts have, accordingly, no jurisdiction ; and if any ecclesiastical tribunal whatever attempts to exceed its proper limits, the High Court of Justice may, and does, prohibit the excess (*s*).

[In the time of our Saxon ancestors, there was no distinction between the lay and the ecclesiastical jurisdictions ; and the sheriff's county court even was originally as much a spiritual as a temporal tribunal,—the rights of the Church being ascertained and asserted at the same time, and by the same judges, as the rights of the laity.

(*q*) See 18 & 19 Vict. c. 32, s. 26.

(*r*) 36 & 37 Vict. c. 66, s. 18.

(*s*) Hale, Hist. C. L. ch. 2 ; *Ex parte Tucker*, 1 Man. & Gr. 519 ;

Tucker v. Inman, 4 Man. & Gr. 1049 ; *Martin v. Mackonochie*, 3 Q. B. D. 730 ; 4 Q. B. D. 697 ; Rules of the Supreme Court, Ord. lxviii. rr. 2, 3.

[For which purpose, the bishop of the diocese, and the alderman (or, in his absence, the sheriff) of the county, used to sit together in the county court, and had there the cognizance of all causes, as well ecclesiastical as civil,—a superior deference merely being paid to the bishop's opinion in spiritual matters, and to that of the lay judge in temporal (*t*). But it afterwards became an established rule, that all ecclesiastical persons, and all ecclesiastical causes, should be solely and entirely subject to the ecclesiastical jurisdiction (*u*); and soon after the Norman conquest, William the Conqueror (whose title was warmly espoused by the monasteries, which he had liberally endowed, and by the foreign clergy, whom he had brought over in shoals, and planted in the best preferments of the English Church) was prevailed upon to separate the ecclesiastical court from the civil, and to prohibit any spiritual cause from being tried in the secular court (*x*). And although Henry the First, on his accession, restored the union of the civil and ecclesiastical courts (*y*), the restoration was ill-relished by the popish clergy, who, under the guidance of Archbishop Anselm, disapproved of a measure which put them on a level with the laity, and which subjected spiritual men and causes to

(*t*) "*Celeberrimo huic conventui episcopus et aldermannus intersunt; quorum alter jura divina, alter humana populum edoceto.*"—Wilk. Leg. Angl.-Sax. LL. Eadg. ch. 5.

(*u*) "Hence the canon lays it down as a rule, that '*sacerdotes a regibus honorandi sunt, non judicandi*' (Decret. part 2, caus. 11, qu. 1, ch. 41); and places an emphatical reliance on a fabulous tale which it tells of the Emperor Constantine; that when some petitions were brought to him,

" imploring the aid of his authority against certain of his bishops
" accused of oppression and injustice, he caused (says the holy canon) the petitions to be burnt in their presence, dismissing them with this valediction: '*Ite et inter vos causas vestras discutite, quia dignum non est ut nos judicemus Deos.*'" (3 Bl. Com. p. 62.)

(*x*) Hale, Hist. C. L. 102; Selden in Eadm. p. 6, l. 24; 4 Inst. 259; Wilk. Leg. Angl.-Sax. 292.

(*y*) 2 Inst. 70.

[the inspection of the secular magistrates ; and, therefore, in their synod at Westminster, 3 Hen. I., they ordained that no bishop should attend the discussion of temporal causes,—the effect of which ordinance was speedily to dissolve the newly-effected union ; and the usurper Stephen, being supported by the clergy, directed, that ecclesiastical persons and ecclesiastical causes should be subject only to the bishop's jurisdiction (z) ;] and such was the origin of the ecclesiastical courts as separate and independent tribunals.

The jurisdiction which the ecclesiastical courts (otherwise called the spiritual courts or courts christian) assumed to exercise, was the administration of justice in all matters in any way connected with the Church,—and which included matters *testamentary* and *matrimonial*, besides a great variety of others. The jurisdiction of these courts in matters testamentary and matrimonial has now ceased, that jurisdiction having, by the 20 & 21 Vict. cc. 77, 85, been transferred to and vested in the Court of Probate and the Court for Matrimonial Causes,—two purely secular tribunals, and which are now represented by the Probate and Divorce Division of the High Court ; but the jurisdiction of the ecclesiastical courts in other matters still remains vested in them.

The particular ecclesiastical courts which have retained their jurisdiction, are the following :—(1.) the Court of the Archdeacon ; (2.) the Court of the Bishop, otherwise called the Consistory Court ; (3.) the Provincial Court of the Archbishop ; and (4.) the Court of Appeal ; and we shall proceed to consider each of these courts in the order in which they have just been enumerated.

1. The Court of the Archdeacon, which holds the lowest place in the ecclesiastical polity, is held, in each archdeaconry, before a judge appointed by the archdeacon

(z) Spelm. Cod. 310.

himself,—and which judge is called his Official ; and the jurisdiction of this court extends to and comprises all ecclesiastical causes arising within the archdeaconry ; and the litigant may, as a general rule, commence his suit either in this court or in that of the bishop,—though, in some archdeaconries, the suit must be commenced in the former, to the exclusion of the latter (*a*) ; and from the archdeacon's court an appeal lies, in general, to that of the bishop,—and this by virtue of the 24 Hen. VIII. c. 12.

2. The Bishop's Court (otherwise called the Consistory Court) is held in the several dioceses, for the trial of all ecclesiastical causes arising within the diocese ; and to this Court have been specially assigned all proceedings instituted against clerks (for *immorality* and the like) under the Clergy Discipline Act, 1892, to be presently mentioned (*b*). The chancellor of the diocese (or his commissary) is the judge ; and under the 24 Hen. VIII. c. 12, an appeal lies from this court to the Provincial Court of the Archbishop,—save as regards proceedings under the Clergy Discipline Act, 1892, the appeal in which is (at the option of the appellant) either to the Provincial Court or to the Privy Council,—the appeal being on questions of *law* only.

3. The Provincial Court of the Archbishop.—This court, —which in the province of York is (or used to be) called the Chancery Court of York, and in the province of Canterbury the Court of Arches, the judge of the court being (in the case of each province) called the official principal (*c*),—receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province ; and the proper jurisdiction of the Court is appellate ; but *original*

(*a*) *Woodward v. Fox*, 2 Vent. 267 ; Godolph. 61.

(*b*) *Lee v. Flack*, [1896] P. 138.

(*c*) The judge of the Court of Arches is also called the *Dean of*

the Arches, because anciently he held his court in the church of St. Mary-le-bow (*Sancta Maria de Arcubus*).

suits may also be brought therein,—suits (that is to say) the cognizance of which belongs properly to the inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction (*d*).

The *Court of Peculiars* is a branch of the Court of Arches, and has jurisdiction over all those parishes (dispersed throughout the province of Canterbury in the midst of other dioceses), which are exempt from the Ordinary's jurisdiction and subject to the Metropolitan only; and all ecclesiastical causes, arising within these peculiar (or exempt) jurisdictions, are originally cognizable by this court,—save only questions of residence and as to pluralties (*e*).

The two Provincial Courts are now united, and have been arranged on a new basis; for, by the Public Worship Regulation Act, 1874 (*f*), it has been provided, that the two archbishops may (subject to the approval of the Crown) appoint “a judge of the Provincial Courts of Canterbury and York,”—who, as a vacancy arises in the office of official principal of Canterbury, or of official principal or auditor of York, shall, *ex officio*, fill such office also; and all proceedings thereafter taken before him shall be deemed to be taken in the Arches Court of Canterbury or the Chancery Court of York, as the case may require; and whenever a vacancy shall arise in the office of master of the faculties to the Archbishop of Canterbury, such judge shall also become *ex officio* master of the faculties; so that (in effect) one supreme tribunal will (or eventually will) exercise all the ecclesiastical functions of these various officials, in a consistent and uniform way (*g*).

(*d*) *Burgoyne v. Free*, 2 Add. 406; *Ex parte Denison*, 4 Ell. & Bl. 292.

(*e*) 1 & 2 Vict. c. 106, s. 108; 48 & 49 Vict. c. 55.

(*f*) 37 & 38 Vict. c. 85.

(*g*) Rules for the procedure of the united provincial court with regard to proceedings taken under this Act, were issued in February, 1879.

4. The Court of Appeal.—This is the Judicial Committee of the Privy Council (*h*), which has superseded the old *Court of Delegates*,—which last-mentioned court was a commission rather than a court, the commission issuing out of Chancery (*i*) under the authority of the 25 Hen. VIII. c. 19, which authorized all manner of appeals to be had and prosecuted from the archbishops' courts to the sovereign in Chancery—the appeal prior to that statute having been to the Pope; and the decision of the Court of Delegates used to be final, although a *commission of review* would, in a proper case, have been granted (*k*).

[Appeals to Rome, we may here observe, were always, even in the times of popery, looked upon by the English nation with suspicion, being deemed not only contrary to the liberty of the subject, but contrary also to the honour of the Crown and to the independence of the realm; and the Constitutions of Clarendon (11 Hen. II.) expressly declared, that appeals in causes ecclesiastical ought to lie from the archdeacon to the diocesan; from the diocesan to the archbishop of the province; and from the archbishop to the king; and they were not to proceed any further without special licence from the Crown (*l*). But in the reigns of King John and his son Henry the Third, the custom of appealing to Rome in causes ecclesiastical was re-introduced, and was never thoroughly broken off till the reign of Henry the Eighth,—when all the jurisdiction of the Pope in matters ecclesiastical was restored to the Crown, by the statute of 25 Hen. VIII. c. 19, before mentioned, which was in this particular, but declaratory of the antient law of the realm (*m*);] and the ultimate appeal thus

(*h*) See 2 & 3 Will. 4, c. 92;
3 & 4 Will. 4, c. 41, s. 3; 6 &
7 Vict. c. 38; 7 & 8 Vict. c. 69,
ss. 9, 12; *Gorham v. Bishop of*
Exeter, 15 Q. B. 52; 37 & 38 Vict.
c. 85, s. 9.

(*i*) 3 Bl. Com. 66.

(*k*) 26 Hen. 8, c. 1; 1 Eliz. c. 1;
3 Bl. Com. 67.

(*l*) Cod. Vet. Leg. 315.

(*m*) 4 Inst. 341.

restored to the king was exercised by him through this Court of Delegates constituted by such commission as aforesaid.

Then, by the 2 & 3 Will. IV. c. 92, it was provided, that every person who might formerly have appealed to the Court of Delegates, should, for the future, bring his appeal to his Majesty in council instead; and by the 3 & 4 Will. IV. c. 41, s. 3, 6 & 7 Vict. c. 38, s. 11, and 7 & 8 Vict. c. 69, s. 9, her Majesty was empowered to direct all appeals from ecclesiastical courts to be referred for decision to the *Judicial Committee* of her Privy Council (*n*); and by the 39 & 40 Vict. c. 59, (The Appellate Jurisdiction Act, 1876,) s. 14, provision is made (as noticed hereafter more fully) for the appointment of certain of the archbishops and bishops to attend as assessors of the Judicial Committee on the hearing of such appeals (*o*).

We now proceed to consider the wrongs or injuries of a pecuniary character that are cognizable in the different ecclesiastical courts, that is to say, (1) The subtraction of tithes; (2) The non-payment of ecclesiastical dues; (3) The spoliation of benefices; and (4) Dilapidations (*p*).

(*n*) As to this committee, *vide sup.* vol. II. p. 408.

(*o*) No notice has been taken in the text, of “the court of *high commission*,” regarding which Blackstone (vol. iii. p. 68) says, —“This court was erected and united to the regal power by virtue of the statute 1 Eliz. c. 1, instead of a larger jurisdiction which had before been exercised under the Pope’s authority. It was intended to vindicate the dignity and peace of the Church, by reforming, ordering, and collecting the ecclesiastical state and persons; and all manner of errors, heresies, schisms, abuses,

“offences, contempts, and enormities. Under the shelter of which very general words, means were found, in that and the two succeeding reigns, to vest in the high commissioners extraordinary and almost despotic powers of fining and imprisoning; which they exerted much beyond the degree of the offence itself, and frequently over offences by no means of spiritual cognizance. For which reasons this court was justly abolished by the statute 16 Car. 1, c. 11.”

(*p*) There was also in the spiritual court a proceeding called *pro salute animæ*,—the offences

[(1.) The *Subtraction of Tithes*. — This wrong or injury consisted in the withholding of tithes from the rector or from the vicar ; and whether the rector was a clergyman or a lay appropriator made no difference (*q*). But the ecclesiastical courts had (or have) no jurisdiction to try the *right* to tithes, unless between spiritual persons (*r*) ; but in ordinary cases, between spiritual men and lay men, are only to compel the *payment* of them, when the right is not disputed (*s*),—so that, if any dispute arises whether such tithes be *due* and *accustomed*, this cannot be determined in the ecclesiastical court, as such questions affect the temporal inheritance, and the determination thereof would bind the real property. But where the *right* does not come into question, but only the *fact* whether or no the tithes allowed to be due are really subtracted or withdrawn, this is a transient personal injury

which were so proceeded against being described in the Report of the Commissioners on the ecclesiastical courts, dated 15th July, 1832, as being (1) Those “ committed by the clergy themselves, “ such as neglect of duty, immoral “ conduct, advancing doctrines “ not conformable to the Articles “ of the Church, suffering dilapidations, and the like offences ” ; and (2) Those “ committed by “ laymen, such as brawling, laying “ violent hands and other irreverent conduct in the church or “ churchyard, violating churchyards, neglecting to repair “ ecclesiastical buildings, incest, “ incontinence.” . . . “ These “ offences ” (the Report goes on to state), “ are punished by “ monition, penance, excommunication, suspension *ab ingressu* “ *ecclesiæ*, suspension from office, “ and deprivation.” But the

offences of that character are now, —when it is a matter of doctrine or of worship, proceeded against under the Church Discipline Act, 1840 ; and when it is a matter of morality, are proceeded against under the Clergy Discipline Act, 1892, and (to some extent) under the Benefices Act, 1898. The spiritual court formerly entertained also suits for *defamation*, where the offence of incontinency was wrongfully imputed ; but by the 18 & 19 Vict. c. 41, the jurisdiction in this matter was abolished ; and the jurisdiction in “ brawling,” against persons not in holy orders, was taken away by the 23 & 24 Vict. c. 32, s. 1.

(*q*) Stat. 32 Hen. 8, c. 7.

(*r*) 2 Roll. Abr. 309, 310 ; Bro. Abr. tit. Jurisdiction, 85.

(*s*) 2 Inst. 364, 389, 490 ; 13 Edw. 1 (statute *Circumspectè agatis*).

[for which the remedy (viz., the recovery of the tithes, or their equivalent) may properly be had in the spiritual court. However, in modern times, it hath seldom happened that tithes are sued for in the spiritual court,—for if the defendant pleads any custom, *modus*, composition, or other matter whereby the right of tithing is called into question, this takes it out of the jurisdiction of the ecclesiastical judge, the law not permitting the existence of such a right to be decided by the sentence of any ecclesiastical judge.] Moreover, a summary method for the recovery of tithes where the value did not exceed 10*l.* (or, where due from Quakers, 50*l.*) having been given by the 53 Geo. III. c. 127, by complaint to two justices of the peace, this proceeding before justices was, by the 5 & 6 Will. IV. c. 74 and 4 & 5 Vict. c. 36, made the *only* remedy for the recovery of tithes not exceeding the above value, no suit for their recovery being allowed either in the civil or in the ecclesiastical courts,—although, if the title to the tithes was *bonâ fide* brought into question, an action in the temporal courts to try the question was permitted as before (*t*). Besides all which, it is to be recollected, that the claim itself to tithes has now become of rare occurrence—this species of property having been, in almost every parish, now commuted into a corn rent-charge under the Tithe Commutation Acts ; and for the recovery of tithes when in arrear, a special mode of proceeding by way of distress and otherwise, or now by action, has been provided (*u*).

[(2.) *Non-payment of Ecclesiastical Dues*.—This is the second injury cognizable in the spiritual courts ; and the injury consists in the withholding from the clergy of such dues as pensions, mortuaries, compositions, offerings, and *surplice-fées*,—all which injuries are redressed by a

(*t*) *Peyton v. Watson*, 3 Q. B. 658 ; *Robinson v. Purday*, 16 Mee. & W. 11.

(*u*) *Vide sup.* vol. II. p. 645.

[decree for their payment;] but the provisions of the Tithe Commutation Acts with regard to the recovery of *tithes*, extend also to oblations and all other ecclesiastical dues and demands whatsoever (*x*).

[(3.) The *Spoliation of Benefices*.—Spoliation is an injury done by one clerk or incumbent to another, in taking the fruits of his benefice under a pretended title and without any right thereto; and this injury is remedied by a decree to account for the profits so taken. When the *jus patronatús* (or right of advowson) doth not itself come into debate, this injury is cognizable in the spiritual court; for example, if a patron first presents A. to a benefice, who is instituted and inducted thereto; and then, upon pretence of a vacancy, *the same* patron presents B. to the same living, and he also obtains institution and induction,—here, if the fact of the vacancy be disputed, then that clerk who is kept out of the profits of the living, whichever it be, may sue the other in the spiritual court for spoliation, *i.e.*, for taking the profits of his benefice; and it shall there be tried, whether the living were, or were not vacant,—that being the question upon which the validity of the second clerk's pretensions must depend (*y*). But if the right of patronage itself comes at all into dispute,—as, *e.g.*, if one patron presented A. and another patron presented B.,—there the ecclesiastical court hath no cognizance, (provided the profits sued for amount to a fourth part of the value of the living,) but may be prohibited, at the instance of either patron, by the writ of *indicavit* (*z*); and if a clerk, without any colour of title, ejects another from his parsonage, this injury also must be redressed in the temporal courts,—for it depends upon no question

(*x*) *Vide sup.* vol. II. p. 653.

(*y*) F. N. B. 36.

(*z*) See 13 Edw. 1 (*Circ. aga.*);
Artic. Cleri, 9 Edw. 2, st. 1, c. 2;
 F. N. B. 45.

[determinable by the spiritual law, (such as vacancy or no vacancy,) but is merely a civil injury.

(4.) *Dilapidations*.—These are a kind of ecclesiastical waste to the chancel or to the parsonage-house and the buildings belonging thereto (*a*); and the waste may be either voluntary,—by pulling down; or permissive,—by suffering to decay (*b*); and for either species of waste, an action will lie either in the spiritual court or in the temporal court (*c*); and the action may be brought by the successor against the predecessor (if living) or against his legal personal representatives (if dead)]—the proceedings in respect of dilapidations being now taken, in general, under the Dilapidations Act, 1871 (*d*), more particularly referred to in a former volume (*e*). The spiritual courts have cognizance also as to *neglects in repairing the church, churchyard, and the like* (*f*).

Proceedings in the spiritual courts might also, until recently, have been brought for the *nonpayment of a church-rate* (*g*); but by the 53 Geo. III. c. 127, 5 & 6 Will. IV. c. 74, and 4 & 5 Vict. c. 36, where the rate was not disputed, and the amount demanded did not exceed 10*l.*—or in the case of Quakers, 50*l.*,—the remedy was before the justices of the peace (*h*); and now, by the 31 & 32 Vict. c. 109, s. 1, no suit or proceeding to compel the payment of a church-rate can be brought in any ecclesiastical or other court, or before any justice or magistrate (*i*).

(*a*) *Vide sup.* vol. II. p. 628.

(*b*) See also 13 Eliz. c. 10, as to a spiritual person making over his goods with intent to defeat his successor of his remedy for dilapidations.

(*c*) *Jones v. Hill*, Cart. 224; S. C. 3 Lev. 268; *Morley v. Leacroft*, [1896] P. 92; *Neville v. Kirby*, [1898] P. 160.

(*d*) 34 & 35 Vict. c. 43.

(*e*) Vol. ii. pp. 598, 606, 629, 650.

(*f*) *Circumspectè agatis*, 5 Rep. 66.

(*g*) 3 Bl. Com. p. 92.

(*h*) *Ex parte Mannering*, 2 B. & Smith, 431; *Pease v. Naylor*, 3 B. & Smith, 620.

(*i*) *Vide sup.* vol. II. p. 614.

The spiritual courts have also jurisdiction in suits respecting *pews and seats* in the body of the church (*k*) ; but where a pew is claimed by prescription, and the right is disputed, the temporal court will, by writ of prohibition, prevent the ecclesiastical court from proceeding farther,—and this, in order that the claim by prescription may be determined by a jury, or at least in accordance with the rules of the common law (*l*).

[As regards the procedure in the ecclesiastical courts, the ordinary course is as follows :—There is first a *citation*, to call the party injuring before them ; and then, secondly, a *libel* (*libellus*, a little book), or articles drawn out in a formal *allegation*, and setting forth the complainant's ground of complaint (*m*) ; and to this succeeds the *defendant's answer* upon oath,—when, if he denies or extenuates the charge, the plaintiff proceeds to *proofs* (*n*). If the defendant has any circumstances to offer in his defence, he must propound them in a *defensive allegation* ; and then there is the *plaintiff's answer* upon oath ; and the defendant may then proceed to proofs (*o*).] And, by the 14 & 15 Vict. c. 99, s. 2, and the 17 & 18 Vict. c. 47, the court may

(*k*) *Mainwaring v. Giles*, 5 Barn. & Ald. 361 ; *Parker v. Leach*, Law Rep. 1 P. C. 312.

(*l*) *Stileman-Gibbard v. Wilkin-*
son, [1897] 1 Q. B. 749.

(*m*) 3 & 4 Vict. c. 86, ss. 7, 8 ; and Rules of 1867 ; and as to the procedure in the Consistory Court of London, see the Rules of 1877 (Law Rep. 2 Prob. Div.).

(*n*) In former times, when a clergyman was cited to appear before the bishop or ecclesiastical court for alleged misconduct, he might have been required to make answer on the oath of himself and his *compurgators* ; which latter persons were certain of his neigh-

bours able to swear that they believed him innocent of the charge ; and this oath, *ex officio* (as it was called), although prohibited generally to laymen (12 Rep. 26), was yet continued, as regarded the clergy, till the middle of the seventeenth century, when it was abolished by the 13 Car. 2, st. 1, c. 12. (Report of Commissioners on Ecclesiastical Courts, 15 Feb. 1832, p. 55.)

(*o*) 3 Bl. Com. p. 100. In Brice's Law relating to Public Worship (chap. iv.), it is pointed out, that there is a difference in the proceedings, according as the suit is civil or criminal. In a civil suit,

summon witnesses, and examine them, or cause them to be examined, by word of mouth,—and that either before or after examination by deposition or affidavit (*p*) ; and notes of such evidence are taken down in writing by the judge, or registrar, or by such other person and in such manner as the judge may direct. [And when all the pleadings and proofs are concluded, they are referred to the consideration of the judge, who *takes information* by hearing advocates on both sides, and thereupon forms his *interlocutory decree* or *definite sentence* at his own discretion.

The ecclesiastical courts have power to pronounce (among other sentences) sentence of *suspension* (*q*), and even sentence of *deprivation* (in the case of suits against beneficed incumbents) (*r*) ; and also sentence of *excommunication*, for offences falling under ecclesiastical cognizance. And as regards the sentence of excommunication, that is described in the books as being of two kinds, —the lesser and the greater,—the lesser excommunication excluding the party from participation in the sacraments, the greater excluding him not only from these, but also from the company of all Christians (*s*). Formerly, too, and until the passing of the Act to be presently mentioned, an excommunicated man was disabled to do any act that was required to be done by a *probus et legalis homo* ; *e.g.*,

they are said to commence with a *citation*, by *decree*, by *monition*, or by *act on petition* ; and then comes the *libel*, the *litis contestatio*, and the *pleas* and *answers*. In criminal suits, the first plea is termed the *articles*, nominally brought under the sanction and in the name of some bishop, whose “*office*” is thus said “*to be promoted*” ; and the articles must not be inconsistent with or beyond the citation.

p) 3 & 4 Vict. c. 86, s. 17 ;

Bishop of Norwich v. Pearse, Law Rep. 2 Adm. & Eccl. Ca. 281.

(*q*) Suspension may be either *ab officio* merely, or *ab officio et beneficio* (Brice’s Public Worship, p. 280).

(*r*) *Martin v. Mackonochie* (No. 1), 3 Q. B. D. 730 ; 4 Q. B. D. 697 ; 6 App. Ca. 424 ; *Benwell v. Bishop of London*, 14 Moore, P. C. 395 ; *Dean v. Green*, 8 P. D. 79 ; *Martin v. Mackonochie* (No. 2), 6 P. D. 57 ; 7 P. D. 94 ; and 8 P. D. 191.

(*s*) 3 Bl. Com. 101.

[he could not serve upon juries, or be a witness in any court, or bring an action, either real or personal, to recover lands or money due to him ; and it was the practice of the ecclesiastical courts to avail themselves of the weapon of excommunication, in order to enforce their sentences and orders in general ; for where any of these were disobeyed, the court excommunicated the disobedient party,—by which not only did he become subject to the consequences above described, but the general law of England stepped in besides to the court's assistance,—permitting the bishop to certify the excommunication to the sovereign in Chancery, who issued thereon to the sheriff of the county, a writ,—called (from the bishop's certificate) a *significavit*, or (from its effects) a writ *de excommunicato capiendo*,—under which the offender was taken to the county gaol, and was there imprisoned until he was reconciled to the Church.] But by the 53 Geo. III. c. 127, it was provided, that no excommunicated person should incur by the sentence any penalty or incapacity whatever, save such imprisonment, not exceeding six months, as the ecclesiastical court should direct ; and that such sentence, unless and until it was signified to the sovereign in Chancery, should not be enforced by the writ *de excommunicato capiendo* ; and by the same Act, excommunication, *as for contempt*, was in effect abolished ; and in lieu thereof, it has been provided, that, where a lawful citation or sentence has not been obeyed, or where a contempt *in facie curiæ* has been committed, the judge shall have power to pronounce such persons “contumacious and in contempt” ; and, after a certain period, to signify the same to the sovereign in Chancery ; whereupon a writ *de contumace capiendo* shall issue (t), and which writ is to

(t) *R. v. Ricketts*, 6 A. & E. 537 ; *R. v. Baines*, 12 Ad. & E. 210 ; *Adam v. Colthurst*, Law Rep. 2 Adm. & Eccl. Ca. p. 40 ; *Dean v. Green*, 8 P. D. 79 ; *Ex parte Green*, 7 Q. B. D. 273 ; *Green v. Ld. Penzance*, 6 App. Ca. 657.

have the same force and effect as formerly belonged (in case of contempt) to a writ *de excommunicato capiendo*.

IX. THE COURTS OF THE UNIVERSITIES OF OXFORD AND CAMBRIDGE.—These are courts subsisting under antient charters granted to these universities and confirmed by Act of Parliament ; and they have an exclusive jurisdiction in (*inter alia*) actions of a civil nature in which any member or servant of the university is a party,—in every case at least where the cause of action arises within the liberties of the university, and the member or servant was resident in the university when it arose (*u*). Which [privilege of exclusive civil jurisdiction was granted, that the students might not be distracted from their studies, by legal process from distant courts or by other forensic avocations ; and the like privilege appears to have been antiently granted also to all the universities of Europe, in pursuance of a constitution of the Emperor Frederick, A.D. 1158 (*x*). The most antient charter containing this grant to the university of Oxford, was 28 Hen. III. A.D. 1244 ; and the privileges thereby granted were confirmed and enlarged by almost every succeeding prince, down to King Henry the Eighth ; in the fourteenth year of whose reign, the largest and most extensive charter of all was granted ; and this last-mentioned charter is the charter now governing the privileges of that university ; and a charter, somewhat similar to that of Oxford, was afterwards granted to Cambridge, in the third year of Queen Elizabeth ; and subsequently was passed the statute of 13 Eliz. c. 29, whereby the legislature recognised and confirmed *all* the charters of these two universities, and those of the 14 Hen. VIII. (for Oxford) and 3 Eliz. (for Cambridge)

(*u*) 4 Inst. 227 ; *Browne v. Renouard*, 12 East, 12 ; *Thornton v. Ford*, 15 East, 634 ; *Turner v. Bates*, 10 Q. B. 292.

(*x*) 3 Bl. Com. 84.

[by name (*y*),—which *blessed Act*, as Sir Edward Coke entitles it (*z*), fully established the civil privileges of these universities.] It is to be observed, however, that the privilege can be claimed only on behalf of members who are defendants; and when an action in the High Court is brought against such member, the university enters a *claim of consuance*, that is, claims the cognizance of the matter; whereupon the action is withdrawn from the High Court and transferred to the university court (*a*); but as regards the university of Cambridge, the privilege is, *semble*, no longer exclusive (*b*). The procedure in the university courts is, for the most part, regulated according to the laws of the civilians, but is subject to any specific rules made by the vice-chancellor with the approval of three of her Majesty's judges; and as regards appeals, the procedure thereon is like that on appeals from other inferior courts, the appeal being to a Divisional Court of the High Court of Justice (*c*).

X. THE COURT OF CHIVALRY, AND COURTS MARTIAL.—There was anciently a court military called the *Court of Chivalry*, held before the lord high constable and the earl marshal of England,—and which court was of an eccentric character, foreign to the general or common law of the realm. And although this court was not a court of record, yet it had a jurisdiction criminal as well as civil,—relating to deeds of arms and of war; and to the redressing of injuries of honour, and encroachments

(*y*) 13 Eliz. c. 29; *Ginnett v. Whittingham*, 16 Q. B. D. 761 (Oxford); and *Browne v. Renouard*, 12 East, 12 (Cambridge).

(*z*) 4 Inst. 227.

(*a*) *Ginnett v. Whittingham*, *sup.*

(*b*) 19 & 20 Vict. c. xvii. s. 18.

(*c*) See (as to Oxford) 25 & 26 Vict. c. 26, s. 12; and Rules of

March 21, 1892, and Order in Council of 23rd August, 1894. See also (as to both Universities) 57 & 58 Vict. c. 16, s. 1, sub-s. (5); and (as to Cambridge) the 57 & 58 Vict. c. lx. (the Cambridge University and Corporation Act, 1894).

in matters of coat-armour, precedency, and other distinctions of families. As a court of honour, the Court gave satisfaction where no other remedy was available, by ordering reparation in point of honour; and for that purpose, it would, *e.g.*, compel the defendant to take the lie upon himself, or to make such other submission as the law of honour required; but the Court did not award pecuniary satisfaction or damages. The Court adjusted also questions concerning the right to armorial ensigns, bearings, crests, supporters, pennons, and the like; and it determined all rights of place and precedence, subject to any royal patent or Act of Parliament. But, latterly, the marshalling of coat armour, which was formerly the pride and study of all the best families in the kingdom, fell into the hands of certain officers called heralds; whose testimony as to descent (it may be observed incidentally) is no longer of the same weight as it once was; nor is such testimony even admissible, as a general rule, as evidence in courts of justice; but the original visitation books of the Herald's Office, compiled at a time when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to the heralds upon oath, are still allowed to be good evidence of pedigree (*d*). The method of commencing proceedings in the Court of Chivalry,—as regarded all that portion of the jurisdiction which it continued to exercise,—was by petition; and the trial was either by witnesses or by combat; and an ultimate appeal lay to the sovereign in person (*e*). But the Court has long since ceased to exercise any jurisdiction as a court,—*scilicet*, of military or martial law; and, indeed, military or martial

(*d*) *Matthews v. Port*, Comb. 63; Taylor on Evidence, 2nd ed. 1358.

(*e*) 3 Bl. Com. 68; 4 Bl. Com. 267; 13 Ric. 2, st. 1, c. 2; Com.

Dig. Courts; Bac. Abr. Courts; *Parker's Case*, 1 Lev. 230; Show. Parl. Ca. 60; 4 Inst. 125.

law has now no place in the institutions of this country,—unless under the articles of war established under the Army Act, 1881 (44 & 45 Vict. c. 58), and the annual Act which brings into force or continues in force yearly in every year, and for no longer period, the Army Act, 1881 ; and all offences, cognisable under these articles of war, are tried before the *courts-martial* which are from time to time constituted, as the occasion requires and as is provided for by the Act; and no appeal lies from the decision of a court-martial, but the matter comes before the Queen personally, that is to say, before her commander-in-chief of the forces.

CHAPTER IV.

OF THE SUPREME COURT OF JUDICATURE.

WE now proceed to consider the superior courts of law and equity, and the changes which have been effected therein by the Judicature Acts (*a*),—changes the general effect of which has been to unite in one court all the superior courts theretofore existing, and so that justice is now administered in a *single* supreme court, in one or

(*a*) The Judicature Acts are:—
36 & 37 Vict. c. 66; 37 & 38 Vict. c. 83; 38 & 39 Vict. c. 77; 39 & 40 Vict. c. 59; 40 & 41 Vict. c. 9; 41 & 42 Vict. c. 35; 42 & 43 Vict. c. 78; 44 & 45 Vict. c. 68; 46 & 47 Vict. c. 29; 47 & 48 Vict. c. 61; 53 & 54 Vict. c. 44; 54 & 55 Vict. c. 14; 54 & 55 Vict. c. 53; and 57 & 58 Vict. c. 16. Various orders and rules of practice have from time to time been made, by the “Rule Committee” of the judges, under these Acts, the principal of which (now in force) are those of 1883, of October, 1884, and of December, 1885; but others have since been (and are from time to time being) added to these, *e.g.*, those of July, 1886; of December, 1886; of May, 1887; of December, 1887; of August, 1888; of December, 1889; of June, 1891; of December, 1891; of August, 1892; of August, 1893; of November, 1893; and of

October, 1894. There are also the orders as to court fees of January, 1884, and July, 1884; and the rules, as to funds in court, of December, 1894,—with some few subsequent orders and rules incidental thereto respectively, besides a great variety of rules under particular statutes. And the multiplicity of these (and of other like) statutory rules having become exceedingly embarrassing, the Rules Publication Act, 1893 (56 & 57 Vict. c. 66), has been passed to regulate (or further regulate) the making of such rules, and to provide for their being duly known before they become operative. And by the 57 & 58 Vict. c. 16, s. 4, the rule-making committee of the judges now includes the President of the Incorporated Law Society, one practising barrister, and one other person appointed by the Lord Chancellor.

other of the Divisions of which an appropriate remedy for all manner of injuries may be had.

From the time then that the above Acts came into operation—that is to say, on the 1st November, 1875—the jurisdictions previously vested in or capable of being exercised by the Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Court of Exchequer, the Court of Admiralty, the Court of Probate, and the Court for Divorce and Matrimonial Causes, were transferred to and became vested in the High Court of Justice, so as to effect a union and consolidation of those several courts; and the London Court of Bankruptcy has since been added thereto as a division of the High Court (*b*); and all these Courts therefore now constitute (in conjunction with the Court of Appeal, newly established by the Acts) one single supreme tribunal wherein is administered both law and equity,—so that if any plaintiff, petitioner or defendant shall advance an *equitable* claim or defence, such relief is given therein as theretofore by the Court of Chancery; and all *legal* claims, demands and liabilities existing by common law, custom, or statute, are recognized and given effect to therein as theretofore by any of the above-mentioned courts (*c*).

But before we treat further of the constitution of this High Court, and the Divisions of which it consists, it will be necessary, in order to explain the alterations effected in our legal system, to give some account of each of the above courts out of which it was composed. And we shall commence with—

I. The Court of Chancery, otherwise called the High Court of Chancery.—This Court [is said to have taken its name from the judge who presided over it, the Lord

(*b*) The Bankruptcy Act, 1883
(46 & 47 Vict. c. 52), ss. 92—94.

(*c*) 36 & 37 Vict. c. 66, ss. 16,
24.

[Chancellor. The office and name of Chancellor was certainly known to the Courts of the Roman emperors ; and from the Roman empire, it passed to the Roman Church,—hence every bishop has to this day his chancellor ; and when the modern kingdoms of Europe were established upon the ruins of the Roman empire, almost every state preserved its chancellor. And although the chancellor appears to have had different jurisdictions and dignities in the different states, still, in all of them, he seems to have had the supervision of all charters, letters, and such other public instruments of the crown as were authenticated in the most solemn manner ; and when seals came in use, he had invariably the custody of the great seal. And, in fact, the office of chancellor or lord keeper (for by the statute 5 Eliz. c. 18 the two designations were declared to be exactly the same), is with us at this day created by the mere delivery of the Great Seal into his custody (*d*) ; and he thereby becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior, in point of precedency, (if of the peerage,) to every temporal lord (*e*) ;] and he has a salary of 10,000*l.* per annum (*f*) ; he [is a privy councillor by his office (*g*) ; and, according to Lord Chancellor Ellesmere, prolocutor (or speaker) of the House of Lords by prescription (*h*) ; and to him (under the Crown) belongs also the appointment of all justices of the peace throughout the kingdom—a power which (in the case of county magistrates) he usually exercises on the nomination of the lord lieutenant. And from having formerly been usually an ecclesiastic, he

(*d*) Lamb. Archeion, 65 ; 1 Roll. Abr. 385.

(*e*) Stat. 31 Hen. 8, c. 10, ss. 4, 8.

(*f*) 14 & 15 Vict. c. 82, s. 17 ;

15 & 16 Vict. c. 87, s. 16 ; and 36 & 37 Vict. c. 66, s. 13.

(*g*) Selden, Office of Lord Chancellor, sect. 8,

(*h*) Of the Office of Lord Chancellor, edit. 1561.

[became keeper of the king's conscience ; visitor, in right of the king, of all hospitals and colleges of royal foundation ; and patron of all the king's livings of the value of 20*l.* per annum or under, in the king's books (*i*) ; and as the representative of the Crown (as *parens patriæ*), he is also the general guardian of all infants, idiots, and lunatics ; and has the general superintendence of all charitable uses in the kingdom ; appoints to the church livings vested in Roman Catholics ; and distributes other offices, dignities, and patronage.

The chancellor used to exercise, besides, a very large jurisdiction in the Court of Chancery, the principal part of which was concerned with that portion of our law which is called *equity*,—although a not inconsiderable portion of the common law also lay within the jurisdiction of the Court (*k*), as in *scire facias* to cancel letters patent, and on petitions of right, traverses of office, and the like.

As regards the distinction between law and equity, and their administration in different courts, the distinction is sensible enough in itself (*l*),—and it prevailed also in

(*i*) Madox, Hist. of Exchequer, 42 ; *Lord Chancellor's Case*, Hobart, 214 ; Gibs. 764 ; 1 Burn's Ecc. Law, 129.

(*k*) The Court of Chancery consisted of *two distinct tribunals*, one being a court of equity, and the other a court or office of *common law* ; and out of the latter court (as an *officina justitiæ*) issued all original writs passing under the Great Seal, and all commissions of sewers, lunacy, and the like. And here it may be mentioned, that some of these writs were originally kept in a *hamper* (whence the "hanaper office," as to which see 5 & 6 Vict. c. 103), and others in a little sack or bag (whence the

"petty bag office," as to which see 12 & 13 Vict. c. 109 ; 37 & 38 Vict. c. 81, s. 5 ; and 42 & 43 Vict. c. 78, Sched. I.). And as to the Office of the Crown in Chancery, see 37 & 38 Vict. c. 81 (The Great Seal Offices Act, 1874) ; 40 & 41 Vict. c. 41 (The Crown Office Act, 1877) ; 43 & 44 Vict. c. 10 (The Great Seal Act, 1880) ; 47 & 48 Vict. c. 30 (The Great Seal Act, 1884) ; and 53 Vict. c. 2 (The Crown Office Act, 1890),—the Office of the Crown in Chancery being wholly distinct from the Crown Office, Q. B. Division, as to which see *infra*.

(*l*) Bacon, De Aug. Scient. lib. viii. ch. 3, app. 45.

[the Roman law, the *jus prætorium* (or discretion of the prætor) being distinct from the *leges* (or standing laws); but in the Roman law, the power of administering both law and equity centred eventually in one and the same magistrate,—just as has now happened in the English law, by the effect of the fusion of law and equity under the Judicature Acts. It is not very clear, in what manner or under what circumstances the administration of equity, as a matter distinct from law, was first established in this country; but it seems, that there was a frequent failure of justice in the common law courts, and that the application for redress had to be made to the king in person, who was wont to refer the matter to his chancellor,—for him to decide as the circumstances (*i.e.*, the equity) of the case should require; and apparently, in these early times the chief judicial employment of the chancellor was in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the Chancery, who were too much attached to antient precedent, it was provided by the Statute of Westminster the Second (13 Edw. I.) c. 24,—called the statute *in Consimili Casu*,—that “whensoever from thenceforth in one case a writ shall be found in the Chancery, and in a like case, falling under the same right and requiring the like remedy, no precedent of a writ can be produced, the clerks in Chancery shall agree in framing a new writ: and if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law, lest it should happen for the future that the court of our lord the king be deficient in doing justice to the suitors.”

This statute *in Consimili Casu* might, with a little pains on the part of the clerks of the Chancery, and a little

[liberality in the judges, have effectually saved the necessity of again recurring for extraordinary relief to the king or to his chancellor (*m*),—but neither the pains nor the liberality were present ; and when uses of land were introduced, towards the end of the reign of Edw. III., and the courts of the common law wholly declined to recognize them, the separate jurisdiction of the Chancery, as a court of equity, became inevitable,—and Waltham, bishop of Salisbury and chancellor to King Richard the Second, afterwards (by a strained interpretation of the Statute *in Consimili Casu*) devised the writ of *subpœna*,—returnable to the Court of Chancery only,—to make the feoffee to uses accountable to his *cestui que use* ; and the writ of *subpœna* was afterwards extended,—by the same chancellor and in spite of much obloquy and opposition,—to other matters wholly determinable at the common law (*n*).

These *uses* of lands were from the first regarded by the ecclesiastical courts as *binding in conscience* ; and suits *pro lésione fidei*, being regarded as a spiritual offence, were entertained by the ecclesiastical courts ; and although somewhat checked by the constitutions of Clarendon (*o*), and even (it is said) adjudged to be contrary to law in the fourth year of King Henry the Third (*p*), still they appear to have been again recognized as in accordance with law, by the statute *Circumspectè Agatis* (13 Edw. I.) (*q*) ; and

(*m*) Blackstone (vol. iii. p. 52) remarks, that this was the opinion of Fairfax, a very learned judge in the time of Edward the Fourth, who says, “ *Le subpœna ne serroit “ my cy soventement use come il est “ ore, si nous attendomus tiels “ actions sur les cases, et main- “ teinomus le jurisdiction de ceo “ court, et d’auter courts.* ”—Year B. 21 Edw. 4, 23.

(*n*) Waltham was in one instance

obliged to pay damages to the party aggrieved by what was thought an unfair extension of the *subpœna* (17 Ric. 2, c. 6).

(*o*) 10 Hen. 2, c. 15 ; Speed. 468.

(*p*) Fitzh. Abr. tit. Prohibition, 15.

(*q*) Berthelet, Stat. Antiq. Lond. 1531, 90 b ; 3 Pryn Rec. 336, differing from Lyndewood, Prov. 1. 2, t. 2, and from the Cotton MS. (Claud. D. 2).

[it is certain that the chancellor (who was in those times invariably an ecclesiastic) was in no way eager to discountenance suits of this nature ; and suits *pro lésione fidei* continued, in fact, to be brought in the ecclesiastical courts till late in the fifteenth century (*r*).

It appears from the parliament rolls (*s*), that in the reigns of Henry the Fourth and Fifth, the commons were repeatedly urgent to have the writ of *subpœna* itself entirely suppressed, as being a novelty against the form of the common law devised by the subtlety of Chancellor Waltham, whereby (it was said) no plea could be determined unless by examination and oath of the parties according to the form of the law civil and the law of holy Church, in subversion of the common law ; and Henry the Fourth yielded so far to this clamour as to pass the statute 4 Henry IV. c. 23, whereby judgments at law were declared irrevocable unless by attaint or writ of error ; but Henry the Fifth turned a deaf ear to the urgency of the commons ; and in Edward the Fourth's time, the process by bill and *subpœna* was become the established practice of the Court of Chancery (*t*).

The jurisdiction on *subpœna* in Chancery appears, however, to have for a long time remained very limited in its extent (*u*) ; and no regular judicial system at that time prevailed in the chancery,—and, in fact, no professed lawyer sat in the court from the times of the Chief Justices Thorpe and Knyvet, successively chancellors to King Edward the Third, in 1372 and 1373 (*x*), to the promotion of Sir Thomas More to the chancellorship by King Henry

(*r*) Year Book, 2 Hen. 4, 10 ; 11 Hen. 4, 88 ; 38 Hen. 4, 29 ; 20 Edw. 4, 10.

(*s*) Rot. Parl. 4 Hen. 4, Nos. 78 and 110 ; 4 Inst. 83 ; 1 Roll. Abr. 370, 371, 372.

(*t*) Rot. Parl. 14 Edw. 4, No. 33

(not 14 Edw. 3, as cited 1 Roll. Abr. 370, &c.).

(*u*) *Diversité des Courtes*, tit. Chancery, fol. 296, Rastell's edit. A.D. 1534.

(*x*) Spelm. Gloss. 111 ; Dugd. Chron. Ser. 50.

[the Eighth, in 1530,—after which time, the Great Seal was committed indiscriminately to lawyers, courtiers (*y*), or churchmen (*z*), until Serjeant Puckering was made lord keeper in 1592, and the office of Lord Chancellor has ever since then been filled by a lawyer, excepting during the short interval from 1621 to 1625, when the seal was entrusted to Dr. Williams, then Dean of Westminster, but afterwards Bishop of Lincoln, and who had been chaplain to Lord Ellesmere, when chancellor (*a*).

In the time of Lord Ellesmere (A.D. 1616), the conflict between the courts of law and equity reached a crisis,—and the matter being referred to the king, he (on the advice of his counsel) gave judgment in favour of the court of equity (*b*).

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court into a more regular system ; but he did not sit long enough to effect any considerable revolution in the science itself, and but few of his decrees have been of any great consequence to posterity. Nor did his successors, in the reign of Charles the First, do much to improve the system ; and after the restoration of Charles the Second, the seal was committed to the Earl of Clarendon, who had withdrawn from practice as a lawyer for nearly twenty years ; and subsequently to the Earl of Shaftesbury, who, (though a lawyer by education,) had never practised at all. But a happier state of things began with Sir Heneage Finch, afterwards Earl of Nottingham, who succeeded to the chancellorship in 1673, and who is reported to have been a man of the greatest abilities and most uncorrupt integrity, a thorough master and zealous defender of the laws, and of a genius which

(*y*) Wriothsley, St. John, and Hatton.

(*z*) Goodrick, Gardner, and Heath.

(*a*) Biog. Brit. 4278.

(*b*) Whitelocke of Parl. ii. 390 ;
1 Chan. Rep. Append. 11.

[enabled him to discover and to pursue the true spirit of justice through and notwithstanding all its technical embarrassments. The then great extension of trade and the then recent abolition of the military tenures, co-operated, moreover, with the abilities and genius of that Lord Chancellor; and he was enabled, in the course of nine years, to build up a system of jurisprudence and jurisdiction upon wide and rational foundations; and he has consequently been regarded as the founder and Justinian of the more modern equitable system, although that was afterwards extended and improved by other great men his successors in the chancellorship.

The judicial duties of the Court of Chancery were from an early period shared in some measure by the Master of the Rolls,—an officer of great dignity, and who, although originally appointed only for the superintendence of the writs and records appertaining to the common law side of the court (*c*), yet afterwards sat on the equity side as a separate though subordinate judge; and there being some question as to the authority of the Master of the Rolls to hear and determine causes, therefore, by the 3 Geo. II. c. 30, it was declared, that all orders and decrees by him made, except such as by the course of the court were appropriated to the Great Seal alone, should be valid, subject nevertheless to be discharged or altered by the Lord Chancellor (*d*);] and by the 3 & 4 Will. IV. c. 94, s. 24, the Master of the Rolls was authorized to hear motions, pleas, and demurrers, as well as causes generally, which should be set down for hearing before him (*e*).

The business of the Court of Chancery latterly increased to such an extent, that the Lord Chancellor and the Master of the Rolls together became unable to cope with it; and

(*c*) 4 Inst. 82; 44 & 45 Vict. c. 68.

(*e*) See 36 & 37 Vict. c. 66, s. 16, sub-s. (1).

(*d*) 3 Bl. Com. 450.

it was found necessary, in the year 1813, to appoint another assistant to the Lord Chancellor, in his judicial functions, under the title of Vice-Chancellor of England (*f*); and after the transfer to the Court of Chancery of the equity business of the Exchequer, which took place in the year 1841, two more Vice-Chancellors were added (*g*),—each of the three Vice-Chancellors sitting, (like the Master of the Rolls,) separately from the Lord Chancellor. A further addition was afterwards made of two judges, called the Lords Justices of the *Court of Appeal* in Chancery (*h*); and this court of appeal consisted, when the Judicature Acts came into operation, of the Lord Chancellor together with these two Lords Justices; and such court of appeal possessed all the jurisdiction exercised by the Lord Chancellor himself, so far as the judicial business in Chancery was concerned; and from this court of appeal an ultimate appeal lay to the House of Lords. But the Lord Chancellor might still have sate alone to hear appeals from the Court of Chancery; and he and the court of appeal might also have re-heard their own decisions,—whereby the necessity of appealing to the House of Lords was in many cases obviated.

II. The Court of Queen's Bench.—This Court was so called because the sovereign used formerly to sit there in person,—whence the style of the court was *coram ipsâ reginâ* or (as the case might be) *coram rege scipso*; and this court was the supreme court of common law in the kingdom (*i*). [This court from the very nature and constitution of it, was not, nor could be, fixed to any certain place, but followed the sovereign's person wherever

(*f*) 53 Geo. 3, c. 24. (*h*) 14 & 15 Vict. c. 83, and 30 &
 (*g*) 5 Vict. c. 5, s. 19; 14 & 31 Vict. c. 64.
 15 Vict. c. 4; and 15 & 16 Vict. (*i*) 4 Inst. 73.
 c. 80, ss. 52—58.

[he went,—for which reason all process which issued out of this court in the sovereign's name was originally made returnable *ubicunque fuerimus in Angliâ* ; and by a special provision contained in the *Articuli super Cartas*, the king's chancellor, and the justices of his bench, were by law required to follow the sovereign, so that he might have at all times near unto him some officials learned in the law (*k*).

The jurisdiction of the court was very high and transcendent. For, Firstly, it kept all inferior jurisdictions within the bounds of their authority, and might either remove their proceedings to be determined before it, or prohibit their further progress below (*l*) ; Secondly, it superintended all civil corporations in the kingdom ; Thirdly, it commanded magistrates and others to do what their duty required, in every case where there was no other specific remedy ; Fourthly, it protected the liberty of the subject by a speedy and summary interposition ; and Fifthly, it took cognizance of both criminal and civil causes,—the former in what was called the crown side (*m*), and the latter in the plea side (*n*), of the court.] The jurisdiction on the crown side of the court will be considered hereafter (*o*) ; but on its plea side, the court exercised (though originally by usurpation grounded on a legal fiction) (*p*) a general jurisdiction and cognizance

(*k*) 28 Edw. 1, c. 5.

(*l*) *Farquharson v. Morgan*,
[1894] 1 Q. B. 552.

(*m*) 6 & 7 Vict. c. 20 ; 23 & 24 Vict. c. 54 ; the Crown Suits Act, 1865 (28 & 29 Vict. c. 104) ; and the Crown Office Rules, 1886.

(*n*) 6 Geo. 4, c. 82.

(*o*) *Vide post*, Book v., chap. xiii. and xiv. and Book vi.

(*p*) This usurpation of the Court

of Queen's Bench originated as follows :—The jurisdiction of the court in civil actions was formerly confined to actions of trespass or other injury, committed *vi et armis*, and to civil actions (other than actions real), in which the defendant was an officer of the court, or was in the custody of the marshal of the court ; and in order to extend the jurisdiction to actions against any defendant, the fiction was

of all actions between subject and subject,—excepting only matters affecting the revenue of the crown, which last mentioned matters were assigned to the Court of Exchequer ; and excepting also matters appertaining to the realty, which were within the exclusive jurisdiction of the Court of Common Pleas. And from the judgments of the Queen's Bench, proceedings by way of error lay ultimately to the House of Lords, there having been an intermediate appeal to the *Exchequer Chamber*,—a court which had been originally constituted as a court of error for the Court of Exchequer, by the 31 Edw. III. st. 1, c. 12, but which was afterwards remodelled by the 11 Geo. IV. & 1 Will. IV. c. 70, s. 8, whereby it was constituted a court of error (or of appeal) from the judgments of all the three superior courts of common law,—the judges of the Court being the judges of the three superior courts, other than of the court whose judgment was to be revised.

III. The Court of Common Pleas (otherwise sometimes called the Court of Common Bench).—This Court took cognizance of all actions between subject and subject, including real actions, and actions appertaining to the realty ; and over real actions (properly so called), this Court exercised originally an *exclusive* jurisdiction,—as also over fines and recoveries, while those modes of assurance existed, and over the forms of conveyance by deed acknowledged which (in the case of married women)

invented of *surmising* that the defendant had committed a breach of the peace in Middlesex or any other county in which the court sat, and in which it was consequently held to possess an extraordinary criminal jurisdiction ; and by aid of this false suggestion, a writ, called a bill of Middlesex, or a writ of *latitat* founded on a bill of Middle-

sex (as the case might be), was issued against him,—by virtue of which he was *supposed to be committed to the custody of the marshal*, so as to bring him within the jurisdiction of the court ; and to this was added, under the *ac etiam* clause, the ground of action which it was the real intention of the parties to try.

were afterwards substituted for them (*q*) ; and, in modern times, this court was entrusted with an exclusive jurisdiction in election matters, including all matters arising under the Parliamentary Elections Act, 1868 (*r*), or under the Corrupt Practices (Municipal Elections) Act, 1872 (*s*) ; and from the judgments of this court, proceedings in error lay, primarily to the Exchequer Chamber, and ultimately to the House of Lords.

IV. The Court of Exchequer :—[By the antient Saxon constitution there was only one superior court of justice in the kingdom,—namely, the *wittenagemote*,—having cognizance of both civil and spiritual cases ; and at the Conquest, the Conqueror had his *aula regis*,—which corresponded (in all essentials) with the Saxon *wittenagemote* ; and the Court of Common Pleas was, in fact, derived out the *aula regis*, the severance taking place in the time of King John : and the Court of Chancery was also, in fact, derived out of the *aula regis* ; and subsequently, the Exchequer also was derived out of the *aula regis*, as the Court for revenue matters ; and the jurisdiction which thereafter remained to the *aula regis* was the jurisdiction (civil and criminal) which fell to (or which then remained with) the King's Bench (*t*).]

The Court of Exchequer, then, was at first intended principally to order the revenues of the crown, and to recover the king's debts and duties (*u*),—though it afterwards acquired (by usurpation grounded on a legal

(*q*) 4 Inst. 99.

(*r*) 31 & 32 Vict. c. 125.

(*s*) 35 & 36 Vict. c. 60.

(*t*) The King's Bench originally retained the superintendence of the other two superior courts ; and after judgment given by either

of these, recourse might be had to it to correct any error of *law* in the proceedings ; but this superintendence was taken from it by the 11 Geo. 4 & 1 Will. 4, c. 70, s. 8.

(*u*) 4 Inst. 103—116 ; *Attorney-General v. Sewell*, 4 Mee. & W. 77.

fiction) (*x*) the additional character of an ordinary court of justice between subject and subject; and the court consisted of two divisions, the *Receipts Department*,—for the management of the royal revenue; and the *Judicial Department*, with which alone we are concerned at present. And down to comparatively modern times the Exchequer (regarded as a Court of Justice) was both a court of equity and a court of common law (*y*); but, by the 5 Vict. c. 5, the equitable jurisdiction of the court was transferred to the Court of Chancery, and its revenue business was transferred to the *Queen's Remembrancer* in the Exchequer (*z*). The Court of Exchequer, therefore, when the Judicature Acts came into operation, consisted of a *revenue* side and a common law (or *plea*) side; and on the revenue side, it ascertained and enforced the proprietary rights of the crown against the subjects of

(*x*) This usurpation of the Court of Exchequer originated as follows:—According to its original constitution, it was the duty of this court to call the king's farmers and debtors to account; and these farmers and debtors were privileged, in their turn, to sue and implead in the same court all persons owing them money,—and for this purpose, they resorted to a writ called a *quo minus*, in which the plaintiff suggested that he was the king's farmer or debtor, and that the defendant had done him the injury or damage complained of, *quo minus sufficiens existit* ("by which he is the less able") to pay the king his debt or rent; and by gradual connivance, this *surmise* of being debtor to the king was allowed to be inserted by plaintiffs who were not in fact debtors to the

king at all, and came to be considered as mere words of course, so as to open the court to litigants generally. Moreover, the same fiction was permitted on the equity side of the court. And when the writ of *quo minus* was abolished, by 2 & 3 Will. 4, c. 39, the new method which was then substituted, gave a direct and proper jurisdiction to this court, in matters of private debt generally.

(*y*) 3 Bl. Com. 45.

(*z*) *Attorney-General v. Hallett*, 15 Mee. & W. 687. By the 22 & 23 Vict. c. 21, and 24 & 25 Vict. c. 92, the office of Queen's Remembrancer was regulated, and the practice and procedure on the revenue side of the Court of Exchequer was amended. (See General Rules, 7 H. & N. 505.)

the realm (*a*) ; while on its plea side, it administered redress between subject and subject,—but without any jurisdiction either in *dower* or in *quare impedit*, which two latter actions belonged to the Court of Common Pleas exclusively ; and from the judgments of the Exchequer, proceedings in error lay primarily to the Exchequer Chamber, and ultimately to the House of Lords.

V. The High Court of Admiralty.—This court had jurisdiction to try and determine all *maritime* causes,—that is to say, all injuries committed on the high seas ; and, generally speaking, and with the exception of any case otherwise provided for by Act of Parliament (*b*), all causes so triable must have been causes arising *wholly* upon the sea, and not within the precincts of any county,—[the statute 15 Ric. II. c. 3 having declared, that the court of the admiral should have no manner of cognizance of any contract or of anything done within the body of any county, either by land or by water (*c*) ; and the court therefore had no jurisdiction in wreck of the sea,—for that must be cast on land before it becomes a wreck ; but the court had jurisdiction as regards *flotsam*, *jetsam*, and *ligan*, and also (under the provisions of particular statutes) with regard to *salvage*. And when part of a contract (or other cause of action) arose upon the sea, and part upon the land, the common law jurisdiction excluded the admiralty jurisdiction (*d*) ; and therefore, though purely maritime acquisitions, which are earned and become due wholly on the high seas—as seamen’s wages—fall properly within the admiralty jurisdiction,—even when the contract

(*a*) 28 & 29 Vict. c. 104 ; 44 & 45 Vict. c. 68 ; Ord. lxviii. (1883), rr. 2, 3 and 4 ; and the Crown Office Rules, 1886.

(*b*) 3 & 4 Vict. c. 65.

(*c*) As to what is *intra corpus comitatûs*, see Com. Dig. Admiralty (E. 14) ; Jac. Law Dict. “Admiral.”

(*d*) Co. Litt. 261.

[for them is made upon land (*e*),—yet, in general, if a contract be made in England (*e.g.*, a charter-party) but is to be executed on the seas,—or if a contract (*e.g.*, a bond to pay money) be made upon the seas, but it is to be performed in England,—these contracts belong not to the admiralty jurisdiction, but to the courts of common law (*f*). It is to be observed, however, that where the admiralty jurisdiction reaches to the original subject-matter in the cause, the jurisdiction will reach (or extend) also to all consequential questions,—though these latter might otherwise have been properly determinable at the common law (*g*); *e.g.*, a suit for beaconage (the beacon standing on a rock in the sea) might be brought in the admiralty, the admiral having an original jurisdiction over beacons (*h*).] And in addition to its general jurisdiction over maritime causes, the Court of Admiralty (under a special commission in that behalf) adjudicated also on *prize of war* (*i*); and (when the matter was specially referred to it by the Crown) (*k*) on *booty of war*. The Court adopted, in its practice, many of the principles of the civil law; and also, as occasion required, made use of the Rhodian laws, and the laws of Oleron—bodies of law derived respectively from the island of Rhodes in the Mediterranean, and the island of Oleron in France (*l*). And from the sentence of the admiralty judge, an *appeal* used to lie, in general, to the Court of Delegates, when that tribunal existed; and from certain of the “vice-admiralty

(*e*) 1 Ventr. 146.

(*f*) *Bridgeman's Case*, Hob. 23; Hale, Hist. C. L. 35; *Le Caux v. Eden*, Doug. 572.

(*g*) 13 Rep. 53; *Ridley v. Egglefield*, 2 Lev. 25; Hardr. 183.

(*h*) *Crosse v. Digges*, 1 Sid. 158.

(*i*) 2 Chit. Gen. Pr. 538 a; 1 Doug. 594; *Lindo v. Rodney*, 2 Doug. 613 n.; *Mitchell v.*

Rodney (in error), 2 Bro. P. C. 423; *Faith v. Pearson*, 6 Taunt. 439.

(*k*) 3 & 4 Vict. c. 65, s. 22; *The Banda and Kirwee Booty*, Law Rep., 1 Ad. & Ecc. pp. 109—269.

(*l*) Hale, Hist. C. L. 36; Co. Litt. 11.

courts" (that is to say, courts with an admiralty jurisdiction established in her Majesty's possessions beyond the seas), appeals might be brought either before the Court of Admiralty in England, or before the Sovereign in Council (*m*). [But in the particular case of prize vessels taken in time of war in any part of the world, and condemned in any courts of admiralty or vice-admiralty as lawful prize, the appeal lay to certain commissioners, called Lords Commissioners in Prize Cases; and this was by virtue of divers treaties with foreign nations; by which, courts were established in all the maritime countries of Europe, for the decision of this question, "whether lawful prize or not,"—for that being a question between subjects of different states, it belonged entirely to the law of nations, and not to the municipal laws of any one country to determine it.] However, by the 2 & 3 Will. IV. c. 92, the appellate jurisdiction of the court of delegates was transferred to the sovereign in council; and, by the 3 & 4 Will. IV. c. 41, s. 2, appeals in prize suits, and in other proceedings in the admiralty or vice-admiralty courts, or in any other court abroad, which might at the date of that Act have been made either to the High Court of Admiralty or to the Lords Commissioners in Prize Cases, were directed in future to be made to the sovereign in council; and by the statute last named, as amended by the 6 & 7 Vict. c. 38 and 7 & 8 Vict. c. 69, the Privy Council was empowered to refer all such appeals to the Judicial Committee thereof; and although the 3 & 4 Will. IV. c. 41, s. 2, has been repealed by the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), the right of appeal to the Privy Council, remains unaffected; and by the 54 & 55 Vict. c. 53, s. 4, it is expressly enacted, that the High Court of Justice (Admiralty Division) shall be a Prize Court within the meaning of the Naval Prize Act,

1864 (27 & 28 Vict. c. 25), and shall have all the jurisdiction of the Court of Admiralty, and that the appeal therefrom shall be to the Privy Council.

VI. and VII. Regarding the Court of *Bankruptcy*, the Court of *Probate*, and the Court for *Divorce and Matrimonial Causes*, it is sufficient here to barely mention them, as they have been elsewhere sufficiently noticed already (n).

Such having been the several courts which, under the Judicature Acts before referred to have been united and consolidated together in the High Court of Justice, we shall now proceed to briefly describe the judges who presided over them, at the date of such union and consolidation. And, Firstly, with regard to the Court of Chancery, we have already said enough regarding the judges of that court. But, Secondly, with regard to the Courts of Queen's Bench, Exchequer, and Common Pleas,—which were usually described collectively “as the Superior Courts of Common Law,” or, as the “Courts at Westminster,”—they were each presided over by a chief justice (called in the Court of Exchequer the Chief Baron); and comprised, in addition, certain “*puisne*” judges, who, in the Court of Exchequer, were designated “*Barons*.” All of these judges taken collectively were popularly called the *judges of the land*, or simply *the judges*; and they were of high dignity and precedence,—taking rank before baronets, and being the constitutional advisers of the House of Lords in matters of law. The number of them varied at different periods of our legal history (o); it remained fixed for a long period at twelve; but (in consequence of the increase of business) an additional judge was appointed, about the beginning of the reign of Will. IV., to each of the three courts (p); and by the 31 & 32 Vict. c. 125, a further

(n) *Vide sup.* vol. II. pp. 144, 229.

(p) 11 Geo. 4 & 1 Will. 4, c. 70, ss. 1, 2.

(o) Dugd. Orig. Jurid. ch. 18.

increase in their number was authorized with reference to the jurisdiction (election petitions) conferred upon them by that Act (*q*). Also, by the 30 & 31 Vict. c. 68, certain parts of the business of the courts which used to be disposed of by the judges sitting in chambers, was directed to be dealt with (in the first instance, and subject to an appeal to the judge) by the *Masters* of the courts under general rules issued for that purpose (*r*). These judges were all created by letters patent; and by the 12 & 13 Will. III. c. 2, they were made irremovable, except upon the address of both houses of parliament. The title of the chief judge of the Court of Queen's Bench was the "Lord Chief Justice of England," and he had a salary of 8,000*l.* a year; while the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer of Pleas, had each a salary of 7,000*l.* a year, the other judges of the three superior courts of common law having a uniform salary of 5,000*l.* a year each. Thirdly, with regard to the High Court of Admiralty, that court was presided over by a judge appointed by the Crown, who formerly sat as the Lord High Admiral's deputy, and who also (but by virtue of separate commissions) presided over the Prize Court. Lastly, the Court of Bankruptcy was presided over by one of the Vice-Chancellors of the Court of Chancery; and the Court of Probate and the Court of Divorce and Matrimonial Causes were presided over, respectively, by the "Judge of the Probate Court," as established by the 20 & 21 Vict. c. 77, and (except at the sittings of the full Court of

(*q*) 31 & 32 Vict. c. 125, s. 11.

(*r*) The business which can be transacted by the Masters for the judges now depends upon Ord. liv. (1883), rr. 11 and 12; and it includes everything that can be transacted by a judge at chambers, with certain specified exceptions. It may be noticed, that, by the

42 & 43 Vict. c. 78 and Ord. liv. (1883), rr. 13—16, the offices of the Masters of the Supreme Court have been re-arranged on a fresh basis, and a Central Office has been established,—which office is placed under the joint control of the Masters.

Divorce) by the “Judge ordinary,” as established by the 20 & 21 Vict. c. 85, in manner formerly mentioned (*s*).

Such having been the different courts, and the judges of the different courts, out of which Her Majesty’s High Court of Justice was composed, it is next to be remembered, that the High Court forms one of two permanent Divisions of the Supreme Court of Judicature,—the other Division being the Court of Appeal; and the remainder of this chapter shall be devoted to a consideration of these two Divisions of the Supreme Court in their order.

Firstly, the High Court of Justice.—This court is constituted a superior court of record; and to it is transferred the jurisdiction which, when the Judicature Acts came into operation, belonged to the several courts of which we have already spoken, and also the common law jurisdiction which at the same date belonged to the Palatinate Courts of Lancaster and Durham, and the jurisdiction appertaining to all commissions of assize, of oyer and terminer, and of gaol delivery. And of the palatinate courts, and of the assize courts, some account may be here desirable.

And, Firstly, with respect to the Palatinate Courts.—In the counties palatine of Lancaster and Durham, there were, at the date of the Judicature Acts, courts both of law and of equity, held before the respective chancellors of those counties palatine, or before judges specially commissioned for that purpose (*t*); and these courts were formerly

(*s*) *Vide sup.* vol. II. pp. 188, 229.

(*t*) 4 Inst. 213, 218; Finch, R. 452. It may be useful to mention here, that there was also a court called *The Court of the Duchy Chamber of Lancaster*; and which court has (or had) a concurrent jurisdiction with Chancery as to matters in equity relating to lands holden of the Crown in right of that duchy (*Owen v. Holt*, Hob.

77; *Fisher v. Patten*, 2 Ley, 74),—which, as Blackstone (vol. iii. p. 78) remarks, is a thing very distinct from the county *palatine* of Lancaster, inasmuch as the duchy includes much territory at a distance from the county palatine, and particularly a very large district surrounded by the city of Westminster. And there were also (and still are) the

exempt from the ordinary process of the courts at Westminster; and even after these counties palatine were re-united in the crown, the maxim still continued to prevail, that the ordinary writs ran not into a county palatine; and, therefore (until a recent period), all process issuing out of the superior courts at Westminster, and intended to be executed in either of those counties, used to be directed in the first instance to the chancellor thereof, who thereupon issued his mandate to the sheriff. And though the judges of assize went into the counties palatine, and tried causes depending in the courts there, they sat by virtue of a special commission from the crown in its capacity of owner of the franchise, and under the seal of the chancellor thereof, and not by the usual commission under the Great Seal of England. But it formed one of the provisions of the Judicature Acts, that henceforth the counties palatine of Lancaster and Durham should respectively cease to be counties palatine, *so far as regards the issue of special commissions of assize or other like commissions*, but not further or otherwise (*u*); and that commissions might be issued for the trial of all causes and matters within such counties respectively, in the same manner in all respects as in any other counties of England and Wales (*x*); and all the jurisdiction which, at the time when the Judicature Acts coming into operation, was vested in or capable of being exercised either by the Court of Common Pleas at Lancaster or by the Court of Pleas at Durham, was transferred to the High Court (*y*); but the Chancery (or equity) jurisdiction of either county palatine was not affected by the Acts (*z*);

Barmote Courts, for deciding questions of title and other matters relating to mines, in certain mining districts (in Derbyshire) belonging to the duchy of Lancaster. (See 14 & 15 Vict.

c. 94; and Bainbridge on Mines, 4th ed., pp. 144, 145.)

(*u*) 36 & 37 Vict. c. 66, s. 99.

(*x*) *Ibid.*

(*y*) Sect. 16.

(*z*) See 13 & 14 Vict. c. 43; *In re Alison's Trusts*, 8 Ch. D. 2.

and the equity jurisdiction therefore still remains,—(for Lancashire) in the Lancaster Chancery Court and (for Durham) in the Durham Palatinate Court.

Secondly, with respect to the Assize Courts.—These are constituted of two or more commissioners,—usually called judges of assize,—who are sent, by special commission from the crown, on *circuits* all over the kingdom, to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the High Court of Justice,—there being, however, as to London and Middlesex, this exception, that instead of their being comprised within any circuit, courts for the trial of issues of fact by a jury are held there, before one or more of the judges of the High Court, four times in every year, at what are called the London and Middlesex *sittings* (*a*). [These judges of assize came into use in the room of the antient justices in eyre (*justiciarii in itinere*), who were regularly established (if not first appointed) by the Parliament of Northampton, A.D. 1176 (*b*) ; and they used to make their circuit once in seven years (*c*) ; but afterwards, by *Magna Charta*, c. 12, they went into every county once a year. And they sometimes held special commissions of assize, or of dower, or of gaol delivery, and the like ; but, more usually, they had a general commission, to determine all manner of causes, being constituted *justiciarii ad omnia placita* (*d*)]. But, in our own day, the commissioners of assize consist exclusively of the judges of the High Court of Justice, to whom the duty is confided of superintending

(*a*) Ord. lxiii. (1883), r. 1 ; 54 & 55 Vict. c. 14 (The Judicature, London Causes, Act, 1891).

(*b*) Seld. Jan. l. 2, s. 5 ; Spelm. Cod. 329.

(*c*) Co. Litt. 293.—“Anno 1261, *justiciarii itinerantes venerunt apud Wigorniam in octavis S. Johannis*

baptiste ;—et totus comitatus eos admittere recusavit, quod septem anni nondumerant elapsi, postquam justiciarii ibidem ultimo sederunt.” —(Annal. Eccl. Wigorn. in Whart. Angl. Sacr. i. 495.)

(*d*) Bract. l. 3, tr. 1, ch. 11.

the trial of matters of fact at the assizes, and incidentally of deciding matters of law and transacting other judicial business there.

The justices or commissioners of assize, as originally appointed under the 13 Edw. I. c. 30, were directed [to be assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county ; and by the 27 Edw. I. c. 4, (explained by the 12 Edw. 2, c. 3,) assizes and inquests were allowed to be taken before any one justice of the court in which the plea was brought, associating to himself one knight or other approved man of the county ; and by the 14 Edw. III. st. 1, c. 16, inquests of *nisi prius* might be taken before any justice of either bench, (though the plea were not depending in his own court,) or before the chief baron of the Exchequer, if he were a man of the law, or otherwise before the justices of assize, so that one of such justices should be a judge of the King's Bench or Common Pleas, or the king's serjeant sworn ;] and latterly, all justices of assize were empowered, on their respective circuits, to try causes pending in the Court of Exchequer, without any separate commission issuing from the Exchequer for the purpose (*e*) ; and all the distinctions aforesaid are now wholly swept away. For, under the Judicature Acts, her Majesty is empowered by commission of assize,—or by any other commission, either general or special,—to assign to any judge or judges of the High Court of Justice, or to other the persons usually named in commissions of assize, the duty of trying issues either of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the High Court ; and while engaged in the exercise of this jurisdiction, the commissioners constitute a court of the High Court, and have all the powers of the High Court (*f*).

(*e*) 2 & 3 Vict. c. 22.

(*f*) 36 & 37 Vict. c. 66, s. 29.

County Court judges are, by the Judicature Act, 1884 (47 & 48 Vict.

Formerly, no man of law could be judge of assize in his own county, wherein he was born or did inhabit (*g*) ; but, in modern times, this prohibition, always inconvenient, was deemed unnecessary ; and, by the 12 Geo. 2, c. 27 and 49 Geo. III. c. 91, it was abolished (*h*).

The commissions which are applicable to civil cases are, the commissions of *assize* and of *nisi prius* (*i*),—the commission of *assize* having reference to the real actions once in use, but now for the most part abolished ; and the commission of *nisi prius* having reference to all other actions ; and the commissions which are applicable to criminal cases are, the commissions of *the peace*, of *oyer and terminer*, and of *gaol delivery*. And with regard to the commission of *nisi prius*, it is to be known, that all questions of fact (in actions ripe for trial) used to be tried at Westminster in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arose,—“*unless sooner*” (*nisi prius*) the judges of assize should come into the county in question ; but, by the effect of the 15 & 16 Vict. c. 76 (“The Common Law Procedure Act,

c. 61), s. 7, and by 51 & 52 Vict. c. 43, s. 16, authorized to be included in the commission,—just as queen’s counsel are (or were) by the 13 & 14 Vict. c. 25.

(*g*) Stat. 4 Edw. 3, c. 2 ; 8 Rich. 2, c. 2 ; 33 Hen. 8, c. 24.

(*h*) The 23rd section of the Judicature Act, 1875 (38 & 39 Vict. c. 77), enables the crown to regulate circuits by Order in Council ; and such orders were accordingly issued, dated 5th February and 17th May, 1876, and 26th June, 1884, constituting the following circuits :—the Northern—the North Eastern—the Midland—the South Eastern—the Oxford—the Wes-

tern, and the North and South Wales circuits. But with regard to the county of *Surrey*, that county was not to be included in any circuit, but commissions were to be issued, for the discharge of civil and criminal business therein, not less often than twice in every year ; but this county has now been included in the South Eastern Circuit (see Order in Council, 28th July, 1893.) See also the Winter Assizes Act, 1876 (39 & 40 Vict. c. 57) ; the Winter Assizes Act, 1877 (40 & 41 Vict. c. 46) ; and the Spring Assizes Act, 1879 (42 & 43 Vict. c. 1).

(*i*) 3 Bl. Com. p. 60.

1852"), the course of proceeding in civil causes was then made no longer even ostensibly connected with this *nisi prius* proviso, the trial being allowed to take place, as a matter of course, before the judges of assize.

Such being the constitution of the High Court of Justice, it is for the more convenient despatch of business subdivided into the following divisions,—that is to say, the Chancery Division; the Queen's Bench Division (now comprising, in addition to the original division of that name, the Common Pleas Division and the Exchequer Division); the Probate, Divorce and Admiralty Division; and the Bankruptcy Division; and we shall deal briefly with each of these divisions in its order.

I. THE CHANCERY DIVISION.—Of this Division, the Lord Chancellor is president; and the other judges thereof included originally the Master of the Rolls and the Vice-Chancellors (*k*), and now include their respective successors,—excepting that the Master of the Rolls (as a judge) is now a judge exclusively of the Court of Appeal (*l*); and to this Division is assigned such business (in general) as would, before the Judicature Acts, have belonged to the Court of Chancery.

II. THE QUEEN'S BENCH DIVISION.—Of this Division, the Lord Chief Justice of England is president; and the existing other judges thereof include some of the persons who were formerly judges of the Court of Queen's Bench; and to this Division is assigned such business (in general)

(*k*) 36 & 37 Vict. c. 66, s. 31; 44 & 45 Vict. c. 68, s. 5. By 40 & 41 Vict. c. 9, s. 2, an additional judge of the High Court was appointed; and by 44 & 45 Vict. c. 68, s. 6, the power of appointing such addi-

tional judge was perpetuated; and under sect. 18 of the 39 & 40 Vict. c. 59, a second additional judge for the Chancery Division may, *semble*, be appointed.

(*l*) 44 & 45 Vict. c. 68, s. 2.

as would have, previously, belonged to that court; and this Division has now had amalgamated with it the Common Pleas Division and the Exchequer Division nextly mentioned.

III. THE COMMON PLEAS DIVISION.—Of this Division, the Lord Chief Justice of the Common Pleas used to be president; and the existing other judges included some of those persons who were formerly judges of the Court of Common Pleas; and to this Division was assigned such business (in general) as would before the Acts have belonged to the Court of Common Pleas at Westminster, or at Lancaster, or to the Court of Pleas at Durham.

IV. THE EXCHEQUER DIVISION.—Of this Division, the Lord Chief Baron of the Exchequer used to be president; and the existing other judges included some of the persons who were formerly barons of the Court of Exchequer: and to this Division was assigned such business (in general) as would previously have belonged to that court, either as a court of revenue or as a court of common law.

In consequence, however, of the Judicature Act, 1881 (44 & 45 Vict. c. 68), the three last-mentioned Divisions of the High Court are now reckoned as but one Division, and are grouped together as the Queen's Bench Division simply; and the Lord Chief Justice of England has (in addition to his former powers as such) all the powers of the late Chief Justice of the Common Pleas and of the late Chief Baron of the Exchequer.

V. THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.—Of this Division, the person who used to fill the joint offices of judge of the Court of Probate and judge ordinary of the Court for Divorce and Matrimonial Causes (or his

successor) is the existing president ; and the other judge is the judge of the former Court of Admiralty (or his successor) ; and to this Division is assigned such business (in general) as would before the Acts have belonged to the Court of Probate, the Court for Divorce and Matrimonial Causes, and the Court of Admiralty respectively (*m*).

VI. THE BANKRUPTCY DIVISION.—Of this Division, which was for the first time created by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 93, it suffices to say, that to it has been assigned all the jurisdiction of the old Court of Bankruptcy in London, with a greatly improved machinery ; and that a special judge of the High Court has been assigned to it (*n*).

The plaintiff may, within certain limitations, choose the Division in which he will take proceedings ; but an order of court, transferring the proceedings from one Division to another, may at any time be made, either upon the or without any application of the parties (*o*). Also, although every action and proceeding in the High Court must, so far as practicable, be disposed of before a single judge, constituting in his own person a court of the High Court, —and (so far as regards the proceedings therein subsequent to the hearing or trial) before the judge before whom such hearing or trial took place (*p*),—still there are certain classes of business which must take place before a *Divisional Court* of the High Court, consisting, in general, of two of the judges of the High Court (*q*) ; also, probate and divorce business is to be assigned to that Division only, and to no other.

(*m*) 36 & 37 Vict. c. 66, ss. 31, 34.

(*n*) 46 & 47 Vict. c. 52, s. 94.

(*o*) See 36 & 37 Vict. c. 66, s. 36 ;
Ord. xlix. r. 1 (1883), and r. 4a

(December, 1885) ; and 47 & 48 Vict. c. 61, s. 6.

(*p*) 53 & 54 Vict. c. 44, s. 2.

(*q*) 36 & 37 Vict. c. 66, s. 42,
and 39 & 40 Vict. c. 59, s. 17.

Secondly, the Court of Appeal. — This Court was intended to supersede all the courts of appeal which were previously in force ; and it will therefore be convenient to notice, firstly, the old system of appeals. Now appeals under the old system were as follows, that is to say :—In the case of most of the inferior courts of civil jurisdiction, the appeal, in a matter of *law*, was to the Queen's Bench exclusively, and in a matter of *equity*, to the Court of Chancery, and in a matter of *admiralty* to the Court of Admiralty ; and the appeal from a county court having jurisdiction in bankruptcy, was to the chief judge in bankruptcy ; and from the provincial *ecclesiastical* courts, the appeal was to the Privy Council. And with regard to the superior courts of common law and of equity, and in Admiralty, the immediate appeal from these courts respectively was to the Court of Exchequer Chamber, and thence to the Court of Appeal in Chancery, or to the Privy Council, according to the distinctions already set forth ; and with regard to the chief judge in Bankruptcy (including the London Registrar in Bankruptcy), the appeal was to the Court of Appeal in Chancery ; and with regard to the Chancery of the County Palatine of Lancaster, the appeal was to the Chancellor of that Duchy sitting with the Court of Appeal in Chancery (*r*) ; and from the Court of Appeal in Chancery and from the Court of Exchequer Chamber, an ultimate appeal lay, in general, to the House of Lords. But under the Judicature Acts, all appeals from petty or quarter sessions, from a county court, or from any other inferior court, which might previously have been brought to any court or judge whose jurisdiction is transferred to the High Court, are now to be heard and determined by a *divisional court* (*s*),—whose determination is in general final (*t*) ; also all the

(*r*) 17 & 18 Vict. c. 82 ; and see 53 & 54 Vict. c. 23, ss. 3, 4.

(*s*) 47 & 48 Vict. c. 61, s. 4 ; and Ord. lix. (1883), rr. 1—4.

(*t*) 36 & 37 Vict. c. 66, s. 45.

appellate jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery, and of the Court of Appeal in Chancery of the County Palatine of Lancaster (*u*), and of the Court of the Lord Warden of the Stannaries, and of the Court of Exchequer Chamber (*x*),—have been transferred to the Court of Appeal created by the Judicature Acts; and under the 56 & 57 Vict. c. 37, s. 10, appeals from the Liverpool Court of Passage, are now also to this Court of Appeal (*y*); and under the 52 & 53 Vict. c. 47, appeals from the County Palatine of Durham are now also to the Court of Appeal,—although formerly the appeal from that Palatinate Court was to the House of Lords direct.

Of the Court of Appeal thus constituted, the Lord Chancellor is the president (*z*); and an ex-Lord Chancellor is *ex officio* a judge thereof, although not obliged to sit (*a*); and in addition to him, there used to be four other *ex officio* judges, viz., the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer (*b*); but, by the 44 & 45 Vict. c. 68, the Master of the Rolls ceased to be an *ex officio* judge, and became a permanent judge, of this court (*c*); and the president for the time being of the Probate, Divorce, and Admiralty Division was made an *ex officio* judge thereof (*d*). There are also a certain number of ordinary judges of this court (all of whom are styled “lords justices of appeal”); among whom are included the two lords justices of appeal in Chancery (or their successors), together with three other judges (*e*).

(*u*) 53 & 54 Vict. c. 23, s. 4.

(*x*) Sect. 18; *Re Longdendale Cotton Spinning Co.*, 8 Ch. D. 153.

(*y*) *Anderson v. Dean*, [1894] 2 Q. B. 222. The procedure in the Court of Passage has been amended by the 59 & 60 Vict. c. 21.

(*z*) 38 & 39 Vict. c. 77, s. 6.

(*a*) 54 & 55 Vict. c. 53, s. 1.

(*b*) 38 & 39 Vict. c. 77, s. 4.

(*c*) 44 & 45 Vict. c. 68, s. 2.

(*d*) Sect. 4; 54 & 55 Vict. c. 53, s. 2.

(*e*) 39 & 40 Vict. c. 59, s. 15; 40 & 41 Vict. c. 9, s. 4.

And to the Court of Appeal as thus established was assigned (besides the other appeals already referred to) every appeal from a divisional court of the High Court, or from any judgment or order of the High Court, or of any judge or judges thereof (*f*) ; but, the judges having at first interpreted this provision a little too largely, it was afterwards provided, by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 20, that no appeal from a divisional court of the High Court should lie to the Court of Appeal, where the decision of the High Court, or of its predecessor the Superior Court, was by statute declared to be final (*g*). Also, under the Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 1, motions for new trials, which used to be made in the first instance to a divisional court of the High Court, are now in all cases made direct to the Court of Appeal ; and under the Judicature Act, 1894 (57 & 58 Vict. c. 16), all appeals from a judge in matters of practice and procedure are to be made to the Court of Appeal, the number of such appealable orders being, however, now greatly reduced by the Act.

(*f*) 36 & 37 Vict. c. 66, s. 19 ; (*g*) 44 & 45 Vict. c. 68, s. 14 ;
Walsall Overseers v. L. & N. W. Rail. Co., 4 App. Ca. 30 ; *Lady Sandhurst's Case*, 23 Q. B. D. 79.
*Corporation of Peterborough v. Wils-
 thorpe Overseers*, 12 Q. B. D. 1.

CHAPTER V.

OF THE ULTIMATE COURTS OF APPEAL.

As has been mentioned in the preceding chapter, an appeal used to lie from the Court of Appeal in Chancery and from the Court of Exchequer Chamber, to the House of Lords ; but it was the intention of the framers of the Judicature Act, 1873, to deprive the House of Lords of this appellate jurisdiction ; and the Act accordingly provided, that no error or appeal should be brought from any judgment or order of the Court of Appeal in England (*a*) ; but, by the Judicature Act, 1875 (38 & 39 Vict. c. 77), that provision was suspended, and by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), was repealed,—so that the ultimate appeal to the House of Lords still remains.

An appeal to the Judicial Committee of the Privy Council used to lie, not only in matters of admiralty and of lunacy but also from the ecclesiastical courts and from the colonial courts ; but it was the intention of the framers of the Judicature Act, 1873, that the functions of the Judicial Committee (as such Court of Appeal) should be transferred to the Court of Appeal ; and the Act accordingly provided, that (in effect) the crown might by order in council direct, that all appeals and petitions to her Majesty, which, according to the law then in force, ought to be heard before the Judicial Committee, should be referred for hearing to, and be heard by, the Court of Appeal (*b*) ; but that provision also was first suspended, and afterwards

(*a*) 36 & 37 Vict. c. 66, s. 20.(*b*) *Ibid.* s. 21.

repealed,—so that the appeal to the Privy Council (Judicial Committee) still remains.

I. AS TO THE HOUSE OF LORDS.—It is expressly provided by the Appellate Jurisdiction Act, 1876 (*c*), that an appeal shall lie to the House of Lords from any order or judgment either of the Court of Appeal in England (or of any of the Scotch or Irish Courts), from which error or an appeal lay thereto at or immediately before the commencement of the Act, that is to say, 1st November, 1876 ; and that such appeal shall be brought by way of *petition*, praying that the matter of the order or judgment appealed against may be reviewed before her Majesty the Queen in her Court of Parliament,—in order that the said court may determine “*what of right, and according to the custom of this realm, ought to be done in the subject-matter thereof*” (*d*). But the appeal is not to be heard and determined, unless there be present not less than three “Lords of Appeal,” that is to say, three of the following persons :—the Lord Chancellor ; the Lords of Appeal (presently to be mentioned) ; and such Peers as have held *high judicial office*, that is to say, the Lord Chancellor of Great Britain or of Ireland, a paid judge of the Judicial Committee, a judge of the High Court of Justice, a judge of the Court of Appeal, and the like (*e*).

With regard to the “lords of Appeal” it is enacted, by the Appellate Jurisdiction Act, 1876, that, in order to aid the House of Lords in the hearing and determination of appeals, her Majesty may appoint by patent two qualified persons (*f*), who shall hold office during good behaviour

(*c*) 39 & 40 Vict. c. 59, s. 3.

(*d*) Sect. 4.

(*e*) Sects. 5, 25.

(*f*) The qualification consists in having held “high judicial office” for not less than two years, such

office being as defined in sect. 25 of the Appellate Jurisdiction Act, 1875, as amended by sect. 5 of the Appellate Jurisdiction Act, 1887 ; or having been for not less than fifteen years a practising

and notwithstanding the demise of the Crown, but who shall be removable on the address of both Houses of Parliament ; and each of such lords of appeal is entitled during life to rank as a baron, and (while he continues in office, and even after his retirement or resignation) (*g*), to a writ of summons to attend (and to sit and vote) in the House of Lords ; but his dignity is not hereditary (*h*), and yet his children are entitled to be called Honourable. And for the purpose of hearing appeals, and to prevent delay in the administration of justice, it is further provided, that the House of Lords may sit as a court of appeal during the prorogation of parliament, and even during the dissolution of parliament,—should her Majesty think fit, by writing under her sign manual, to authorize the lords of appeal to hold sittings during such dissolution (*i*). The Act also substitutes the proceeding by way of appeal for the proceeding by way of error, which latter it wholly abolishes (*k*) ; and the period of one year (instead of five years as formerly) is the time limited for bringing the appeal ; and the House may now, in a proper case, call in *assessors* (*l*).

II. AS TO THE JUDICIAL COMMITTEE.—It will be remembered, that, by a statute passed in 1871 (34 & 35 Vict. c. 91), her Majesty was enabled to appoint four judges as paid members of the judicial committee (*m*) ; and the appointment of, and the tenure of office by, these four judges, were the same as those just mentioned with regard to the Lords of Appeal ; but the Appellate Jurisdiction Act, 1876, provides for the gradual substitution of

barrister in England or Ireland, or a practising advocate in Scotland. (Sect. 6).

(*g*) 50 & 51 Vict. c. 70, s. 2.

(*h*) Sect. 6.

(*i*) Sects. 8, 9.

(*k*) Standing Orders have been issued by the House of Lords, regulating the practice on appeals under this Act.

(*l*) 54 & 55 Vict. c. 53, s. 3.

(*m*) *Vide sup.* vol. II. p. 409.

additional Lords of Appeal for these paid members of the judicial committee ; and directs that, subject to the due performance of his duties with regard to appeals in the House of Lords, it shall be the duty of a Lord of Appeal, if a privy councillor, to sit and act also as a member of the judicial committee (*n*). And the same Act also provides, that her Majesty by order in council, with the advice of the judicial committee or any five of them (the Lord Chancellor being one), and of the archbishops and bishops who are members of the privy council (or any two of them), may make rules for the attendance, as *assessors* of the committee on the hearing of ecclesiastical cases, of such number of the archbishops and bishops of the Church of England as may, by such rules, be determined (*o*).

(*n*) 39 & 40 Vict. c. 59, ss. 6, 14.

(*o*) Sect. 14.

CHAPTER VI.

OF THE DIFFERENT SPECIES OF CIVIL INJURIES, AND OF THE
REMEDIES THEREFOR,—AND HEREIN OF THE REMEDY
BY ACTION GENERALLY.

WE shall now proceed to the examination of the different species of civil injuries and of the remedies (by action) for redressing same,—it being a settled principle in the law, that every wrong must have a remedy (*a*). The remedy by action may be in the Queen's Bench Division of the High Court, and is then commonly called a common law action ; or it may be in the Chancery Division (or in some other Division) of the High Court, and is then commonly called an action (or formerly a suit) in Chancery (or a Probate, Divorce, or Admiralty action) ; and a common law action differs most materially from a chancery action,—such, *e.g.*, as “an action of foreclosure,” or “of partition” ; and it is necessary (or at least convenient) to treat of these actions separately, commencing with the common law action,—this having been the first (and being still the most usual) action for the redress of a civil wrong. And here we will observe, once for all, and in order to obviate repetition, that though (under the Judicature Acts) many of the distinctions about to be explained have for the most part little reference to the proceedings which now take place in an action, yet these distinctions still exist, and information as to them is still desirable (*b*).

[The plain natural remedy for every species of wrong is the being put in possession of that right whereof the

(*a*) 3 Bl. Com. p. 23.

(*b*) *Bryant v. Herbert*, 3 C. P. D. 389.

[party injured is deprived ; and this may be effected either by the specific delivery of the subject-matter in dispute to the legal owner, or (where that is not possible) by making the sufferer a pecuniary satisfaction in damages ; and an action is, accordingly, defined by the *Mirroure* as being “ the lawful demand of one’s right ” (*c*),—or (as Bracton and Fleta express it) in the words of Justinian, *jus prosequeudi in judicio quod alicui debetur* (*d*).

And in the first place, actions (according to an antient division) were either *personal*, *real*, or *mixed*. *Personal* actions were (and are) those whereby a man claimed (and claims) the specific recovery of a debt or of a personal chattel, or else satisfaction in damages for some injury done to his person or property (*e*). *Real* actions,—or, as they are called in the *Mirroure*, *feudal* actions,—concerned real property only, and were actions whereby the plaintiff (*scil.* demandant) claimed the specific recovery of lands, tenements, or hereditaments (*f*); and it was by *real* actions that all disputes concerning real estates were formerly decided; but in modern times, real actions gradually became less frequent in practice,—upon account of the great nicety required in their management and the inconvenient length of their process ; and a much more expeditious method of trying titles was at a later period introduced, particularly the action of ejectment, of which we shall have occasion presently to speak; and, by the 3 & 4 Will. IV. c. 27, s. 36, all real actions (with but one or two exceptions) were abolished. *Mixed* actions were suits partaking of the natures of both real and personal actions, some real property being demanded therein, together with personal damages for the wrong sustained (*g*); but they partook, in the main, of

(*c*) Ch. 2, s. 1.

(*d*) Inst. 4, 6.

(*e*) 3 Bl. Com. 117.

(*f*) Bl. Com. *ubi sup.* citing *Mirr.* ch. 2, s. 6.

(*g*) 3 Bl. Com. 117.

the character of real actions, and were often so called (*h*) ; and they were abolished at the same time as the real actions above mentioned.

On the general abolition of real and mixed actions just referred to, the following escaped destruction, viz.,—the writ of *right of dower*, the writ of *dower*, the writ of *quare impedit*, and the action of *ejectment* (*i*). The two first of these lay where the demandant claimed lands or tenements by the particular title of dower,—the first of them being applicable, where the woman was endowed of part of her dower, and was deprived of the residue, lying in the same town, by the same tenant by whom she was endowed of part (*k*) ; and the second was proper in all other cases where she was entitled to dower (*l*). And the action of *quare impedit* lay where the right to present to a benefice had been disturbed, the object of the action being to recover the presentation. And the action of *ejectment* lay, where lands or tenements were unlawfully withheld without any title or continuing title thereto, the object of the action being the recovery of the possession.

Personal actions were actions founded either on *contracts* or on *torts* ; that is to say, they were either actions *ex contractu* or actions *ex delicto*,—torts being wrongs independent of contract, and being either (1) *nonfeasances*,—or the omission of acts which a man was by law bound to do ; or (2) *misfeasances*,—or the improper performance of lawful acts ; or (3) *malfeasances*,—or the commission of acts which were themselves unlawful (*m*). And the forms

(*h*) Co. Litt. 285 b ; Roscoe, Real Actions, 1.

(*i*) Ejectment, prior to the statute 15 & 16 Vict. c. 76, (by which its form was remodelled,) was often considered as a *mixed* action (see 3 Bl. Com. 214) ; and was expressly so denominated in

the statute 3 & 4 Will. 4, c. 27 ; and yet, in its form, it was a species of the personal action of trespass. (See Fitz Ab. tit. Ejectione Firmæ, 2.)

(*k*) Roscoe on Real Actions, 29.

(*l*) *Ibid.* 39.

(*m*) 1 Chit. Pl. 134, 1st edit.

of personal actions which were latterly recognized were eight, viz.: *debt*, *covenant*, *assumpsit*, *detinue*, *trespass*, *trover*, *trespass on the case*, and *replevin*,—the three first being founded on contract, and the remaining five on tort (*n*); and although all forms of action have been abolished, and every action is now a simple action on the case, still every personal action continues to be more or less in the nature of one or other of the eight forms of action just specified; and it is accordingly desirable to treat of these eight in their order.

(1) *Debt* lies, where the object is the recovery of a certain sum of money alleged to be due from the defendant to the plaintiff; (2) *Covenant*, where redress in damages is sought for the breach of an agreement entered into by deed; and (3) *Assumpsit*, where damages are claimed for the breach of a promise not made by deed. On the other hand (4) *Detinue* lies, where the object is to recover a personal chattel unlawfully detained; (5) *Trespass*, where the plaintiff claims damages for a trespass *vi et armis* (*o*), that is, for an injury accompanied with actual force, *i.e.*, a wrongful entry upon land, or a wrongful taking and keeping of personal chattels; and (6) *Trover*, where (the wrongful *taking* being waived) the plaintiff claims damages for the wrongful *keeping* (or conversion); (7) *Trespass on the case* was a form of action less antient than the rest, having apparently first come into use in the reign of Edward the Third (*p*); and it was invented under the authority of the statute *In consimili casu* (13 Edw. I.), c. 24, upon

(*n*) The action of *detinue*, though founded on a *tort*,—viz., the wrongful detainer of a chattel (see *Gladstone v. Hewitt*, 1 Cr. & J. 565),—was considered (for some purposes) as an action *on contract* (see *Bryant v. Herbert*, 3 C. P. D. 389).

(*o*) In actions of trespass, the formal words *vi et armis*, and *contra pacem*, were formerly always used in the pleadings; but the necessity for this was abolished by the 15 & 16 Vict. c. 76, s. 49.

(*p*) Hist. of Eng. L. by Reeves, vol. iii. pp. 89, 243, 391.

the analogy of the old form of trespass; and it lay in every case (not falling within the compass of the other forms) where damages were claimed for an injury either to the person or to property,—*e.g.*, where there was no act immediately injurious to person or property, but there was only a culpable omission; or where the act done was not *immediately* injurious, but only by *consequence* or *collaterally*,—in either of which two cases, no action of trespass, properly so called, would lie, but only an action on the *case* for the damages consequent on such omission or act (*q*); and this action on the case was the action of *trespass on the case*. Also, where the subject-matter was not corporeal, so that the idea of *force* was inapplicable, the remedy was case and not trespass, even though the injury was by act done, and its operation was direct and immediate (*r*). And (8) *Replevin* was (and is) an action of limited application, having been (and being) almost invariably confined to trying the legality of a *distress* levied upon the personal chattels of the plaintiff (*s*).

Actions used also to be classed as *local* and *transitory*,—the former being founded on such causes of action as necessarily refer to some particular locality, as in the case of trespasses to land; the latter on such causes of action as may take place anywhere—as in the case of trespasses to goods, batteries, and the like. Thus, real actions were always in their nature local, personal actions were for the most part transitory; and local actions must formerly, as the general rule, have been tried in the county where the cause of action arose, and by a jury of that county, while transitory actions might have been tried in any county, at

(*q*) *Scott v. Shepherd*, 2 Bl. Rep. 892; *Gilbertson v. Richardson*, 5 C. B. 502.

(*r*) 1 Chitty, Pl. 143, cites Com. Dig. Action, Case, Disturbance, (A. 2).

(*s*) It lies, however, in other cases also of goods unlawfully taken. (*George v. Chambers*, 11 Mee. & W. 149; *Mellor v. Leather*, 1 Ell. & Bl. 619.)

the discretion (in general) of the plaintiff. And it followed, that in respect of a trespass on land out of the jurisdiction, no action would lie in an English court; but where the action was transitory (as for breach of contract), the action would lie in the English courts, whether the breach were committed in England or elsewhere. But the distinction between actions as local or transitory has been abolished under the procedure introduced by the Judicature Acts; only, the fact that an action is of the old local class is some ground for an application to change the venue, if the defendant should desire it (*t*).

An action for damages will (in general) lie, wherever a right has been invaded—or, in other words, an injury committed,—although no damage has been actually sustained,—it being material to the establishment and preservation of the *right* itself, that its invasion shall not pass with impunity (*u*). Thus, an action by one commoner against another, for surcharging the common, is maintainable, although the plaintiff may not himself have turned on any cattle of his own, and can therefore have sustained no actual loss (*x*); and in such cases, there being no ground for awarding damages (save in vindication of the right), the plaintiff recovers some trifling sum by way of *nominal* damages,—in addition to which, the defendant has in general to pay the plaintiff's costs of the action, in addition to his own. But to sustain an action for damages, it is, in general, requisite, that the plaintiff

(*t*) There is now “no local venue
“ for the trial of any action; but
“ when the plaintiff proposes to
“ have the action tried elsewhere
“ than in Middlesex, he shall name
“ the place he proposes in his
“ statement of claim, and unless
“ a judge otherwise orders it shall
“ be there tried; and if no place

“ be named, it shall be tried in
“ Middlesex.” (Ord. xxxvi. (1883)
r. 1.)

(*u*) 1 Saund. by Wms. 346 b.

(*x*) *Wells v. Watling*, 2 Bl. Rep. 1233; *Marzetti v. Williams*, 1 B. & Adol. 426; *Blofeld v. Payne*, 4 B. & Adol. 410; *Rogers v. Whiteley*, 23 Q. B. D. 236.

shall have sustained some loss (whether actual or nominal) *of a kind proper and peculiar to himself*; and where the damage is of a merely public character,—affecting persons at large equally with the plaintiff,—no civil action in general lies; *e.g.*, no action can in general be maintained for an encroachment on the highway, but the offender is liable to be indicted, as for a public misdemeanor. On the other hand, where the plaintiff sustains any *special* damage, he has a right of action in regard to the special damage, even although the case may also amount to a misdemeanor; *e.g.*, if, by reason of a ditch dug across the highway, a man or his horse suffers any injury by falling therein, then for this particular damage, which is not common to others of the lieges, the party shall have his action (*y*); and in these cases the occurrence of the damage is portion of the very ground of the action (*z*). And so in the case of unlawful violence, designedly done to the person, though that always amounts, in contemplation of law, to a crime, yet the party injured is entitled to his civil remedy; but this distinction is to be observed, that in case the crime committed amounts to a felony, the remedy for the private injury is *suspended* until the sufferer has fulfilled his duty to the public, by prosecuting the offender for the public crime; though in the case of a mere misdemeanor,—such as an assault, battery, libel, and the like,—the civil remedy by action is immediately available (*a*), and is in general the alternative of the criminal proceeding (*b*); but where A.'s servant assaulted B., and was fined for the assault, B. was held entitled

(*y*) 3 Bl. Com. 220; *Wilks v. Hungerford Market*, 2 Bing. N. C. 281.

(*z*) *Backhouse v. Bonomi*, 9 Ho. Lo. Ca. 503; *Darley Main Co. v. Mitchell*, 11 App. Ca. 127.

(*a*) *Crosby v. Leng*, 12 East, 409; *White v. Spettigue*, 13 Mee. & W.

303; *Wells v. Abrahams*, Law Rep., 7 Q. B. 554; *Osborn v. Gillett*, *ib.* 8 Exch. 88; *Ex parte Turquand, In Re Shepherd*, 9 Ch. D. 704.

(*b*) 24 & 25 Viet. c. 100, s. 45; *Reg. v. Mahon*, 4 A. & E. 575.

afterwards to sue A. himself for damages for the assault (*c*) ; and that is the law.

But it is to be particularly observed, that though an action will lie for an injury unattended with actual damage (*injuria sine damno*), yet none can be maintained even for loss or damage actually inflicted, unless it result from an injury,—that is, from some invasion of a right, or from some breach of a duty,—a mere *damnum absque injuriâ* (or *damnum sine injuriâ*) not being actionable,—even although the damage should have been maliciously occasioned (*d*), *semble*. Therefore, if I have a mill, and my neighbour builds another mill upon his own ground, *per quod* the profit of my mill is diminished, yet no action lies against him,—for every one may lawfully erect a mill on his own ground ; but if I have a mill by prescription on my own land, and another erects a new mill, which draws away some portion of the stream from mine, so as to diminish its former power, an action for damages will lie against him,—for in such a case there is an invasion of my prescriptive right, and not damage merely (*e*). Also, but in some few cases only, the same injury (being regarded in a twofold character) may be the ground of two distinct actions, the damages being distinct in each, and being therefore cumulative (*f*).

But a plaintiff is not entitled to recover in respect of any damage that is too *remote* ; in other words, the damage, in order to be recoverable (*g*), must flow naturally

(*c*) *Dyer v. Munday*, [1895] 1 Q. B. 742.

(*d*) *Allen v. Flood*, [1898] A. C. 1 ; *Huttley v. Simmons*, [1898] 1 Q. B. 181 ; *Hubbuck v. Wilkinson*, [1899] 1 Q. B. 86 ; and consider *Lyons and Sons v. Wilkins*, [1896] 1 Ch. 811,—affirmed on appeal.

(*e*) Bac. Ab. Actions on the Case (C).

(*f*) *Brunsdon v. Humphrey*, 14 Q. B. D. 141.

(*g*) *Hadley v. Baxendale*, 9 Exch. 341 ; *Horne v. Midland Rail. Co.*, Law Rep., 8 C. P. 131 ; *Bowen v. Hall*, 6 Q. B. D. 333 ; *The Notting Hill*, 9 Prob. Div. 105 ; *Halestrap v. Gregory*, [1895] 1 Q. B. 561 ; *Mowbray v. Merryweather*, [1895] 2 Q. B. 640.

and directly from the injury committed ; *e.g.*, where the plaintiff engaged a public singer and the defendant libelled her,—and the plaintiff brought his action for the libel, alleging that by reason of the libel, the singer was deterred from performing in public through the apprehension of being ill-received,—whereby the plaintiff lost the profits he would otherwise have gained,—it was held, that the damage was too remote, and the action was not maintainable (*h*). Also, no action lies against a judge,—at least, of the superior courts,—in respect of any act of a judicial character, even although the plaintiff alleges malice and oppressiveness (*i*) ; and this may partly be from the difficulty of ascertaining that the damage is the natural consequence of the wrong.

The right to sue may, in general, be transferred,—and that either by operation of law, or by an express assignment thereof (*k*) ; *e.g.*, the rights of action of a bankrupt pass to the trustee ; and upon the death of either of the parties between whom a cause of action founded on contract has arisen, the right of maintaining such action survives, in general, to or against his executors or administrators (*l*) ; and to these (as well as to the bankruptcy trustee) the right also belongs, in general, of *continuing* actions, which the deceased (or the bankrupt) has commenced (*m*). But as regards an action for slander, that *dies with the person* (*n*) ; and this was originally so, as regards every action for

(*h*) *Ashley v. Harrison*, 1 Esp. 48 ; *Kelly v. Partington*, 5 B. & Adol. 645 ; *Knight v. Gibbs*, 1 Ad. & El. 43 ; *Green v. Button*, 1 Tyr. & G. 118 ; *Langridge v. Levy*, 4 Mee. & W. 337 ; *Chamberlain v. Boyd*, 11 Q. B. D. 407.

(*i*) *Houlden v. Smith*, 14 Q. B. 841 ; *Fray v. Blackburn*, 3 B. & S. 576 ; *Kemp v. Neville*, 10 C. B.

(N.S.) 523 ; *Anderson v. Gorrie*, [1895] 1 Q. B. 668.

(*k*) 36 & 37 Vict. c. 66, s. 25, sub-s. (6).

(*l*) *Stubbs v. Holywell*, Law Rep., 2 Exch. 311 ; *Bradshaw v. Lancashire and Yorkshire Railway Company*, *ib.* 10 C. P. 189.

(*m*) 15 & 16 Vict. c. 76, ss. 137, 138 ; 17 & 18 Vict. c. 125, s. 92.

(*n*) 3 Bl. Com. 302.

a *tort* (*o*) ; but, except with reference to causes of action for the violation of personal rights (such as assault, slander, and the like,) this antient rule has been now set aside by various Acts of Parliament,—that is to say :—By the 4 Edw. III. c. 7, actions may be maintained *by* executors or administrators, for trespasses to the *personal* property of the testator or intestate ; and by the 3 & 4 Will. IV. c. 42, s. 2, for any injury to his *real* estate,—provided the injury, in the latter case, be committed within six calendar months before, and the action is brought within one year after, the death : also by the 3 & 4 Will. IV. c. 42, actions may be maintained *against* executors or administrators, for any wrong committed by the deceased to another, in respect of the property of the latter, whether real or personal,—provided the wrong was committed within six calendar months before the death, and the action is brought within six calendar months after the executors or administrators have taken on themselves the administration (*p*). Moreover, by the 9 & 10 Vict. c. 93 (commonly called Lord Campbell's Act, and which has been amended by the 27 & 28 Vict. c. 95),—neither of the Acts applying, however, to aliens out of the jurisdiction (*q*),—whenever the death of a person shall be caused by such wrongful act, neglect, or default as would (if death had not ensued) have entitled the party injured to maintain an action for damages, the wrongdoer may be sued for the benefit of the wife, husband, parent, or children of the person injured,—and this although the death shall have been caused under such circumstances as amount in law to a felony ; and the jury may, in such a case, give damages proportionable to the injury resulting from such death, to be divided among the parties for whose benefit the action is brought,

(*o*) 1 Chit. Pl. 56.

(*q*) *Adam v. British and Foreign*

p) *Kirk v. Todd*, 21 Ch. D. *Steamship Co.*, [1898] 2 Q. B. 484 ; *Phillips v. Homfray*, 11 App. 430.

Ca. 466.

in such shares as the verdict shall direct (*r*). Which last-mentioned action is, in general, brought by the executor or administrator of the deceased ; but inasmuch as the action must be brought within twelve calendar months of the death, if there be no executor or administrator, or no action be brought by him or her within six months after the death, the action may be brought by all or any of the parties to be benefited by the result. Also, the redress given under the Employers' Liability Act, 1880 (*s*), to servants in respect of certain injuries sustained by them in their employments, is available also when the injury results in death ; and, in like manner, the compensation which is recoverable under the Workmen's Compensation Act, 1897 (*t*).

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| <p>(<i>r</i>) <i>Duckworth v. Johnson</i>, 4 H. & N. 653 ; <i>Pym v. Great Northern Railway Company</i>, 4 B. & Smith, 396 ; <i>The Bernina</i>, <i>Mills v. Armstrong</i>, 12 P. D. 58 ;</p> | <p>13 App. Ca. 1 ; <i>Bulmer v. Bulmer</i>, 25 Ch. Div. 409.
 (<i>s</i>) 43 & 44 Vict. c. 42.
 (<i>t</i>) 60 & 61 Vict. c. 37.</p> |
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CHAPTER VII.

OF THE DIFFERENT SPECIES OF CIVIL INJURIES, AND
THEIR REMEDIES.

WE shall now proceed to consider the application of the remedy by action to the various civil injuries; and as rights were diversely divided (we may remember) into personal rights, rights of property, rights in private relations, and public rights, it will be convenient to regard civil injuries according to the like divisions.

Firstly, INJURIES AFFECTING PERSONAL RIGHTS.

Of injuries affecting *life*, these are not merely civil wrongs, but (where committed wilfully) are crimes; but regarding them only as civil wrongs, there are some few cases in which the law gives damages for the death, that is to say:—(1) under Lord Campbell's Act (9 & 10 Vict. c. 93); (2) under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42); and (3) under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37),—all which Acts have, however, been already sufficiently considered, the first of them in the preceding chapter, and the other two in the chapter on the Relation of Master and Servant.

With regard to injuries affecting a man's *limbs* or *body*, these may be committed,—Either (1) By *threats* (or menaces of bodily hurt), through fear of which a man's business is in fact interrupted (*a*); or (2) By an *assault*,—as where one who is in a position to do harm to another lifts up his cane or his fist in a threatening manner, or strikes at him, but misses him (*b*); or (3) By a *battery*,—which is the beating of another against his will, the

(*a*) 3 Bl. Com. p. 120, citing
Finch, L. 202.

(*b*) Finch, *ubi supra*; Bl. Com.
ubisup.; *Reed v. Coker*, 13 C.B. 850.

least touching of another's person, wilfully or in anger, amounting to a battery (c) ; or (4) By *wounding*,—which consists in giving another some dangerous hurt, and is only an aggravated species of battery ; or (5) [By *mayhem*,—which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defence in fight ; and among defensive members are reckoned not only arms and legs, but a finger, an eye, and a fore-tooth (d) ; but, it is said, that the loss of the ear, or the nose, is no mayhem at common law, as they can be of no use in fighting.] For each of these injuries,—threats, assault, battery, wounding, and mayhem,—an action will lie, whereby adequate damages may be recovered ; and for the four last, at least, an indictment may be brought as well as an action (e). It is to be observed, however, as to all these acts, that to render them either actionable or indictable, they must be committed on an unlawful occasion,—for under certain circumstances they may be justifiable, and then they form no just ground of complaint either civil or criminal. Thus, assault and battery are justifiable, where one who has authority (as a parent or master) gives moderate correction to his child, his scholar, or his apprentice (f) ; also, if one strikes me first, I may strike in my own defence, and (if sued for it) may raise the defence of *son assault demesne* (g) ; also, if a man endeavours to deprive me of my goods and chattels, I may justify laying hands upon him to prevent him, and (in case he persists with violence) I may proceed to beat him away (h). Thus, too, in the exercise of an office, as

(c) Bl. Com. *ubi sup.* ; *Coward v. Baddeley*, 4 H. & N. 478.

(d) Finch, L. 204 ; 1 Hawk. P. C. 111.

(e) *Reg. v. Mahon*, 4 A. & E. 575. As to the punishment of an *assault* (which is implied in every case of battery, wounding, or mayhem) either by indictment or (in

certain cases) by way of summary conviction, *vide post*, vol. IV. bk. VI. ch. IV. and ch. XI.

(f) Hawk P. C. bk. i. ch. 61, s. 23 ; *Winstone v. Linn*, 1 B. & C. 469.

(g) *Oakes v. Wood*, 3 Mee. & W. 150 ; *Cockcroft v. Smith*, 2 Salk. 642.

(h) Finch, L. 203.

that of churchwarden or beadle, a man may lay hands upon another, to turn him out of the church and prevent his disturbing the congregation ; and if sued for this or the like battery, he may set forth the whole case, and state that he laid hands upon him gently (*molliter manus imposuit*) for this purpose.

And besides the more direct injuries to a man's limbs or body which have been enumerated, there is a (6th) species of injury thereto, which is indirect or consequential, resulting more particularly from *negligence* in the performance of some duty ; for example, in the case where a passenger in a coach is overturned by the carelessness of the driver (*i*). And in such a case, an action for damages will lie against the coach proprietor, not only where he is guilty of the negligence in his own person, but also where the fault was that of his servant,—for “*qui facit per alium, facit per se*” (*k*). And for maintaining unprotected a spiked wall adjoining a highway, whereby a child is injured, the owner of the wall will be liable (*l*),—as also generally for damages from dangerous machinery remaining unfenced (*m*). Also, for damage done to the person, by a brute beast accustomed to do mischief (*n*), the owner of the beast is liable,—provided the plaintiff can prove the *scienter*, that is, can show that the owner knew of its mischievous habit (*o*) ; and merely to show

(*i*) *Brotherton v. Woodrod*, 3 B. & Bing. 54 ; *Clark v. Chambers*, 3 Q. B. D. 327 ; *Radley v. London and North Western Rail. Co.*, 1 App. Ca. 754 ; *The Bernina, Mills v. Armstrong*, 13 App. Ca. 1, overruling *Thorogood v. Bryan*, 8 C. B. 115.

(*k*) *Gordon v. Rolt*, 4 Exch. 365 ; *Sharrod v. London and North Western Rail. Co.*, *ibid.* 580 ; *Elliott v. Hall*, 15 Q. B. D. 315.

(*l*) *Fenna v. Clare*, [1895] 1 Q. B. 199.

(*m*) *Blenkinsop v. Ogden*, [1898] 1 Q. B. 783 ; *Groves v. Wimborne*, [1898] 2 Q. B. 402.

(*n*) *May v. Burdett*, 9 Q. B. 101 ; *Cox v. Burbidge*, 13 C. B. (N.S.) 430 ; *Worth v. Gilling*, Law Rep., 2 C. P. 1.

(*o*) *May v. Burdett*, *ubi sup.* ; *Baldwin v. Casella*, Law Rep., 7 Exch. 325. As to the detention

that the dog has previously bitten (*e.g.*) a goat, will not suffice (*p*). There may, however, be circumstances in which mischief caused by an animal, though known to be dangerous, will not support an action,—for example, in the case of a dog, kept for the protection of its owner's house and yard, if the dog be carefully confined within the premises, and the injury is caused by the plaintiff's having entered the premises improperly, or without sufficient caution, there will be no remedy to the party bitten for the bite (*q*); but as regards the owners of dogs, their liability has been rendered slightly more onerous by statute, it being now provided, that if an action be brought for any injury by a dog to *cattle or sheep*, it shall not be necessary for the plaintiff to show either a previous mischievous propensity in the dog or any knowledge (*i.e.*, *scienter*) by the owner of such propensity, or even that the injury complained of was attributable to neglect on the part of such owner (*r*); and the word *cattle* in the statute referred to has been interpreted to include horses and mares (*s*).

Injuries affecting a man's *health* are, where, by any unwholesome practices of another, a man sustains any damage in his vigour or constitution,—as by selling him bad provisions or bad wine (*t*), or by exercising a noisome trade in his neighbourhood (*u*), or by playing upon him a serious practical joke (*x*); and neglect or unskilful management of the surgeon, or physician, who attends him is also (on occasion) an injury to a man's

and destruction (under a "*rabies order*") of stray dogs, see 34 & 35 Vict. c. 56; and the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 3.

(*p*) *Osborne v. Chocquell*, [1896] 2 Q. B. 109.

(*q*) *Bates v. Crosbie*, M. T. 1798, in the King's Bench, cited in Christian's Black. vol. iii. p. 154.

(*r*) 28 & 29 Vict. c. 60.

(*s*) *Wright v. Pearson*, Law Rep., 4 Q. B. 582.

(*t*) 1 Rol. Abr. 90; *R. v. Southerton*, 6 East, 133; *George v. Skivington*, Law Rep. 5 Exch. 1.

(*u*) 9 Rep. 58; Hut. 135; *R. v. Dewsnap*, 16 East, 194.

(*x*) *Wilkinson v. Downton*, [1897] 2 Q. B. 57.

health (*y*),—and *mala praxis*, whether it be for experiment or by neglect, is a grave offence at the common law (*z*) ; and for all these wrongs or injuries, there is a remedy by action to recover damages (*a*). And we may, without impropriety, classify under this heading, of injuries to health, the injury commonly known as the “*subtraction*” by either spouse of those conjugal rights which he or she owes to the other ; and for which injury, the Ecclesiastical Court provided a remedy by compelling the parties to live together, the suit for that purpose being called a suit for the restitution of conjugal rights (*b*). And this suit afterwards lay in the Divorce Court, which succeeded to the former ecclesiastical jurisdiction in this particular (*c*) ; and it now lies, of course, in the Divorce Division of the High Court ; but that Court may now, in a proper case, and under the 47 & 48 Vict. c. 68, make a pecuniary provision for the injured party, in lieu of specifically enforcing the resumption of the conjugal relation (*d*).

Injuries affecting a man’s *reputation* or good name are,—
Firstly, by the publication of a slander upon him, *i.e.*, by speaking to a third person defamatory words respecting him. The principal cases in which words will be considered defamatory, so as to amount to the legal injury of which we now speak, are as follows : viz., where a man utters anything of another which accuses him of having committed a criminal offence (*e*)—as to say that he has poisoned another or is perjured (*f*) ; or which charges him with having an infectious disorder (*e.g.*, the itch

(*y*) *Dr. Groenvelt’s Case*, 1 Ld. Raym. 214 ; *Seare v. Prentice*, 8 East, 348 ; *Slater v. Baker*, 2 Wils. 359 ; *Hancks v. Hooper*, 7 Car. & P. 81 ; *Lanphier v. Phipos*, 8 Car. & P. 475.

(*z*) 3 Bl. Com. 122 ; 1 Ld. Raym. 214.

(*a*) *R. v. Long*, 4 Car. & P. 398 ; *ib.* 407, n. (*a*).

(*b*) *Yelverton v. Yelverton*, 1 Sw. & Trist. 574.

(*c*) *Weldon v. Weldon*, 9 P. D. 52.

(*d*) *Weldon v. Weldon*, 10 P. D. 72.

(*e*) *Webb v. Beavan*, 11 Q. B. D. 609.

(*f*) *Roberts v. Camden*, 9 East, 93.

or the leprosy) tending to exclude him from society (*g*) ; or which tends to prejudice him in the way of his office, profession, or trade (*h*),—as to say of a magistrate that he is partial or corrupt (*i*), or of a physician that he is a quack (*j*), or of a lawyer that he knows no law (*k*), or of a tradesman that he is a bankrupt (*l*) ; and for words of the several species above mentioned, an action may be had, without proving the loss of any definite temporal advantage, or special damage (*m*) ; and further, by the Slander of Women Act, 1891 (*n*), making general what was formerly the law in particular places only, such as London and Bristol (*o*), words which impute unchastity or adultery to any woman or girl are now also actionable without proof of special damage. But with regard to disparaging words other than those mentioned above, the plaintiff, in order that he may succeed, must aver and prove that the words have caused him special damage,—and this is called (or used to be called) laying the action with a *per quod* (*p*) ; as if I say of a commission agent, that he is an unprincipled man, and borrows money without repaying it, this is not in itself actionable ; but if I say this to a person who was going to deal with him, and he forbears to do so in consequence of its being said,

(*g*) Com. Dig. Act. Def. (D. 28) ;
Bloodworth v. Gray, 7 Man. & G.
334.

(*h*) *Bellamy v. Burch*, 16 M. & W. 590 ; *Foulger v. Newcomb*, L. R. 2 Ex. 327 ; *Alexander v. Jenkins*, [1892] 1 Q. B. 797 ; *Booth v. Arnold*, [1895] 1 Q. B. 571.

(*i*) Com. Dig. Act. Def. (D. 28) ;
2 Cro. 90 ; *Ashton v. Blagrove*,
Ld. Raym. 1369 ; *How v. Prinn*,
2 Salk. 694.

(*j*) *Allen v. Eaton*, 1 Roll. Abr.
54 ; *Goddart v. Haselfoot*, 1 Roll.
Abr. 54.

(*k*) *Peard v. Jones*, Cro. Car. 382.

(*l*) *Robinson v. Marchant*,
15 L. J. Q. B. at p. 136 ; *Brown v.*
Smith, 13 C. B. 596.

(*m*) *Foulger v. Newcomb*, L. R.
2 Ex. 327 ; *Miller v. David*, L. R.
9 C. P. 118.

(*n*) 54 & 55 Vict. c. 51.

(*o*) *Power v. Shaw*, 1 Wils. 62.

(*p*) *Hopwood v. Thorn*, 8 C. B.
293 ; *Barnett v. Allen*, 3 H. & N.
376 ; *Chamberlain v. Boyd*, 11
Q. B. D. 407.

—here, there being special damage, an action will lie against me (*q*).

It is, however, to be understood, that even where special damage has been sustained in consequence of words spoken with respect to any person, yet if the words are not in themselves disparaging, it is *damnum absque injuriâ*, and no action can be maintained upon them (*r*).

Secondly, a man's reputation may be injuriously affected by the publication of a *libel* upon him,—which may be by writing, printing, picture, or the like, of a defamatory character. The nature of this injury is in general similar to that of slander, but there are some material differences between the two, that is to say,—Firstly, in the case of libel, the law assumes, that, of necessity, the person defamed has suffered damage; and in the absence of legal justification or excuse, the publication of such a statement is wrongful (*s*); while, on the other hand, in the case of slander, spoken words are not actionable unless either they impute to the defamed person charges of the offensive kind above specified (*t*), or else produce as their natural consequence some special damage. And again, not only such imputations as will support an action for words spoken, but all contumelious matter that tends to degrade a man in the opinion of his neighbours, or to make him ridiculous, will amount, when conveyed in writing, printing, picture, or the like, to libel (*u*). And lastly, while oral defamation is ground for an action only, there are, in the case of a published libel, two remedies—one by indictment, (or sometimes by criminal information,) and the other by action,—the former for the *public* offence,

(*q*) *Storey v. Challands*, 8 Car. & P. 234; *The Western Counties Manure Co. v. The Lawes Chemical Manure Co.*, L. R. 9 Exch. 218.

(*r*) *Kelly v. Partington*, 5 B. & Ad. 645.

(*s*) *Ratcliffe v. Evans*, [1892] 2 Q. B. at p. 529; and *South Hetton Coal Co. v. N. E. News Association*, [1894] 1 Q. B. at p. 144.

(*t*) *Supra*, pp. 409, 410.

(*u*) *Monson v. Tussauds, Ltd.*, [1894] 1 Q. B. 671.

(for every libel has a tendency to provoke a breach of the peace,) and the latter for the *private* injury to compensate in damages the person who has been libelled.

In order to determine whether a statement is defamatory, it must be construed in its natural and ordinary meaning ; and if not defamatory in such meaning, it must be construed in the special meaning, if any, in which it was understood by the persons by and to whom it was published (*v*) ; and it is for the judge to say, whether, in such a case, the words are reasonably capable of a defamatory meaning ; but it is for the jury to say whether, under the circumstances of the case, the words in fact bear that meaning (*x*).

When the words are not *primâ facie* defamatory, and when the plaintiff therefore intends to maintain that the words were defamatory by reason of their being understood in a special sense, he must be careful to insert in his statement of claim an averment specifying the defamatory meaning of the words complained of, and showing how they come to have that meaning, and how they relate to the plaintiff (*y*) ; and such averment is called an *innuendo* ; but no innuendo is necessary when the words complained of are defamatory in their ordinary meaning (*z*).

It is, of course, well understood, that no action can be maintained for libel or slander unless there be *publication*,—that is to say, unless there be a communication by the defendant of the words complained of to some person other than the plaintiff (*a*) ; but in criminal cases it is not necessary that there should be publication in this sense, it being sufficient if the words complained of be communicated by the defendant to the prosecutor himself, and

(*v*) *Capital and Counties Bank v. Henty*, 7 App. Cas. 741 ; Fraser's Libel and Slander, 2nd ed., p. 9.

(*x*) *Henty's Case*, *supra* ; *Nevill v. Fine Art and General Insurance Co.*, [1897] A. C. 68, at pp. 73, 76, 77.

(*y*) *Capital and Counties Bank v. Henty*, 7 App. Cas. at p. 748.

(*z*) *Ibid.* ; *Russell and Another v. Webster*, 23 W. R. 59.

(*a*) *Barrow v. Lewellin*, Hob. 62 ; *Pullman v. Hill and Co.*, [1891] 1 Q. B. 524.

that their natural tendency is to provoke the prosecutor to commit a breach of the peace (*b*); also, a mere *repetition* of the libel or slander is a publication of it (*c*).

The defences peculiar to an action of libel are four in number, viz. :—1. Justification ; 2. Fair comment ; 3. Privilege ; and 4. Apology. The last-named defence is, however, only available when the libel is “contained in a public newspaper or other periodical publication.” Similar defences, with the exception of that of Apology, are open to the defendant in an action of slander.

Of these defences in their order—

1. JUSTIFICATION.—In all cases of actions (as opposed to prosecutions) for injury to the reputation, if the defendant can prove the words spoken to be *true*,—*i.e.*, in legal phraseology, if he can justify the words complained of,—the action will be barred ; and this whether they were or were not in law defamatory, or whether special damage ensued or not ; for the action being only for damages, the law esteems the truth a bar to the recovery of damages.

The defendant must prove that the *whole* libel is *substantially* true (*d*) ; and if there be gross exaggeration, the plea of justification will fail (*e*). On the other hand, it is not necessary to justify every detail of the charge or general terms of abuse, provided that the gist of the libel or slander is proved to be substantially correct, and that the details, etc., which are not justified produce no different effect on the mind of the reader than the actual truth would do (*f*).

(*b*) *Rex v. Garrett, Hick's Case*, Hob. 215; *Rex v. Wegener*, 2 Stark. 245; *Reg. v. Brooke*, 7 Cox C. C. 251.

(*c*) *De Crespigny v. Wellesley*, 5 Bing. 392.

(*d*) *Bishop v. Latimer*, 4 L. T. 775.

(*e*) *Clarkson v. Lawson*, 6 Bing. 266, 587; *Wakley v. Cook and Healey*, 19 L. J. Ex. 91.

(*f*) *Fraser's Libel and Slander*, 2nd ed., p. 84; *Willmet v. Harmer and Another*, 8 C. & P. 695.

It is not a defence to criminal proceedings to prove that the words complained of are true; the defendant must then be prepared to go further, and prove, that not only are the words true, but that it is for the public benefit that they should be published (*g*).

2. FAIR COMMENT.—No action lies, if the defendant can prove that the words complained of are a fair and *bonâ fide* comment on a matter of public interest; and this distinction is to be remembered, namely,—that the Court decides whether the matter commented on is one of public interest; and if the Court is of opinion that there is some evidence that the comment is unfair, then the jury finds whether it is so in fact (*h*).

It is incorrect to say that *bonâ fide* comments on matters of public interest come under qualified privilege (*i*); for, in such a case, the defence really is, that the words are not defamatory but only fair and proper comment (*k*). All comment must be *bonâ fide*; and criticism must not be made a cloak for malice. The matter commented on must, moreover, be a matter of public interest,—under which description come all State and parliamentary matters (*l*); the public conduct of every one who takes part in public affairs (*m*),—but not the private conduct of such persons, save in so far as it affects their public relations (*n*); legal (*o*) and ecclesiastical matters (*p*); the

(*g*) 6 & 7 Vict. c. 96, s. 6.

(*h*) *South Hetton Coal Co. v. North-Eastern News Association*, [1894] 1 Q. B. 133, at p. 143.

(*i*) *Campbell v. Spottiswoode*, 32 L. J. Q. B. 185; 3 B. & S. 769; *Merivale v. Carson*, 20 Q. B. D. 275.

(*k*) *Campbell v. Spottiswoode*, 32 L. J. Q. B. 185; 3 B. & S. 769.

(*l*) *Dunne v. Anderson*, 3 Bing. 88; 1 Moore, 407; R. & M. 287; 28 R. R. 591; *Wason v. Walter*,

L. R., 4 Q. B. 73; 38 L. J. Q. B. 34.

(*m*) *Kelly v. Sherlock*, L. R., 1 Q. B., at p. 689; 35 L. J. Q. B. 209.

(*n*) *Wisdom v. Brown*, 1 T. L. R. 412; *Pankhurst v. Hamilton*, 3 T. L. R. 500.

(*o*) *Cox v. Feeney*, 4 F. & F. 13; *Purcell v. Sowler*, 2 C. P. D. 215 (C. A.).

(*p*) *Kelly v. Tinling*, L. R. 1 Q. B. 699; 35 L. J. Q. B. 231.

management of the poor and the administration of the poor law (*q*) ; the conduct or management of places of public amusement or entertainment (*r*) ; literature (*s*) ; art (*t*) ; and, in short, anything, which invites public attention or criticism (*u*).

3. PRIVILEGE.—Where defamatory words are spoken or written in the course of parliamentary, judicial, naval, military, or state proceedings, they will not support an action ; for on such an occasion the words are absolutely privileged in the interests of public policy, and are protected, no matter how untrue or malicious, or what special damage they have caused (*x*).

Upon certain other occasions, the privilege is not absolute but merely qualified. Upon occasions of qualified privilege, no action lies unless the plaintiff proves that the defendant, in publishing the words complained of, was actuated by express malice, *i.e.*, by any corrupt or wrong motive or personal spite or ill will (*y*). When the circumstances are such as to cast on the defendant the duty of making the communication to a third party, the occasion is one of qualified privilege ; so again, when he has an interest in making the communication to the third person, and the third person has a corresponding interest in receiving it (*z*). Under this head of privilege come communications as to the characters of clerks and servants ; for no one is obliged to give his clerk or servant a character ; but if he does so, he must do it honestly, and then, even if it be in fact untrue, the master will be protected (*a*).

(*q*) *Purcell v. Sowler*, 2 C. P. D. 215 (C. A.) ; 46 L. J. C. P. 308.

(*r*) *Dibdin v. Swan and Bostock*, 1 Esp. 28 ; *Green v. Chapman*, 4 Bing. N. C. 92 ; 5 Scott, 340.

(*s*) *Campbell v. Spottiswoode*, 32 L. J. Q. B. 185 ; 3 B. & S. 769.

(*t*) *Thompson v. Shackell*, M. & M. 187 ; 31 R. R. 728.

(*u*) *Morrison v. Belcher*, 3 F. &

F. 614 ; *Duplany v. Davis*, 3 T. L. R. 184 ; *Merivale v. Carson*, 20 Q. B. D. 275 (C. A.).

(*x*) *Fraser's Libel and Slander*, 2nd ed., p. 101.

(*y*) *Ibid.* p. 150.

(*z*) *Pullman v. Hill & Co.*, [1891] 1 Q. B. 524, at p. 530.

(*a*) *Murdoch v. Funduklian*, 2 Times L. R. 215, 614.

Under the head of qualified privilege also come fair and impartial reports of proceedings in parliament or in any court of justice or in any public meeting or meeting of certain public bodies and persons specified in sect. 4 of the Law of Libel Amendment Act, 1888 (*b*),—in all which cases, the plaintiff, in order to succeed, must prove that the defendant has been actuated by malice.

4. APOLOGY.—The above mentioned defences of justification, privilege, and fair comment are equally applicable to libel and slander. There is a further defence under sect. 2 of Lord Campbell's (Libel) Act (*c*). This defence is, however, only available in an action for a libel contained in a public newspaper or other periodical publication ; and the defendant must prove,—(1) that the libel was published without actual malice and without gross negligence ; and (2) that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or publication a full apology for such libel (*d*). Moreover, by the 8 & 9 Vict. c. 75, s. 2, there must be a payment of money into court by way of amends at the time the plea is filed ; and therefore, having regard to Order XXII., Rule 1, no other defence denying liability can be pleaded together with such plea.

For the sake of convenience, it seems desirable to deal shortly in this place with the subject of slander of title,—which consists of a false and malicious statement, in writing printing or by word of mouth, injurious to any person's title to property, and causing special damage to such person ; and for the publication of such a statement, an action will lie. And yet in such a case, there is no wrong to the reputation—no defamation—and the action is not for libel or slander, but is an action on the case for special damage sustained by reason of the speaking or publication

(*b*) 51 & 52 Vict. c. 64.

(*d*) *Ibid.*

(*c*) 6 & 7 Vict. c. 96.

of the slander of the plaintiff's title (*e*). In order to succeed, the plaintiff must prove :—

- (1.) That the statement is false ;
- (2.) That it is malicious in fact ; and
- (3.) That it has caused him special damage.

It is also actionable to publish maliciously, or without lawful occasion, a false statement disparaging the goods of any person, and causing such person special damage (*f*).

And here we may also conveniently refer to that peculiar species of injury to the reputation which arises from a man (or, as more usually happens, a woman) going about and boasting, or giving out, that he (or she) is married to the plaintiff ; and the judgment in such an action (which now lies in the divorce division of the High Court) is to put the defendant to perpetual silence (*g*).

A third way of destroying or injuring a man's reputation, is by preferring a malicious indictment or prosecution against him ; for, under the mask of justice and public spirit, the process of the law is sometimes made the engine of private spite and enmity (*h*) ; and for this, accordingly, an adequate remedy is afforded, by awarding damages in an action for a false and malicious prosecution. Which action may be brought,—either against a single person or against several, with an allegation in the latter case that they conspired together for the purpose (*k*). However, any reasonable and probable cause for preferring a prosecution is sufficient to justify the defendant ; and in order

(*e*) *Malachy v. Soper*, 3 Bing. N. C. 371 ; *Smith v. Spooner*, 3 Taunt. 346 ; *Day v. Brownrigg*, 10 Ch. Div. 294.

(*f*) *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R., 9 Ex. 218, 222 ; *Ratcliffe v. Evans*, [1892] 2 Q. B.

at p. 524 ; *White v. Mellin*, [1895] A. C. 154 ; and see *Fraser's Law of Torts*, 4th ed., pp. 128, 129.

(*g*) *Lord Hawke v. Corri*, 2 Hagg. 220.

(*h*) *Turner v. Ambler*, 10 Q. B. 252.

(*k*) 1 Saund. by Williams, 229 a.

to maintain this action, the burthen lies therefore on the plaintiff of showing that no reasonable or probable cause existed (*l*) ; and he must also prove that the defendant acted maliciously. The malice here spoken of is malice in fact,—*i.e.*, an indirect or improper motive,—being any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice (*m*) ; but the existence of malice is purely a question of fact for the jury, who may, if they choose, infer it from the fact that the defendant acted without reasonable and probable cause (*n*). Further, the plaintiff must prove, either that he was acquitted upon such prosecution, or that it was in some other manner legally determined in his favour (*o*),—*e.g.*, he may show, that the indictment was either thrown out by the grand jury, or quashed by the court ; for it is not the danger of the plaintiff, but the scandal, vexation, and expense to which he is put, upon which this action is founded (*p*).

The right of personal *liberty* may be invaded by the injury of false imprisonment (*r*) : and to constitute this injury, there are two points requisite :—1. The detention of the person ; and 2. The unlawfulness of such detention. Now every detention of the person is an imprisonment, whether it be in a common prison, or in a private house ; or even by forcibly detaining one in the street (*s*). The

(*l*) *Johnstone v. Sutton*, 1 T. R. 549 ; *Musgrove v. Newell*, 1 Mee. & W. 582 ; *Michell v. Williams*, 11 Mee. & W. 205 ; *Metropolitan Bank v. Pooley*, 10 App. Ca. 210 ; *Abrath v. North East. Rail. Co.*, 11 App. Ca. 247.

(*m*) *Stevens v. Midland Counties Rail. Co.*, 10 Ex. at p. 356.

(*n*) *Perryman v. Lister*, L. R. 4 H. L. 521.

(*o*) *Morgan v. Hughes*, 2 T. R. 225 ; Willes, 520 n. ; *Whitworth v. Hall*, 2 B. & Adol. 695.

(*p*) *Jones v. Gwynn*, 10 Mod. 19, 220 ; *Chambers v. Robinson*, 1 Str. 691.

(*r*) *Edgell v. Francis*, 1 Man. & Gr. 222 ; *Glynn v. Houstoun*, 2 Man. & Gr. 337 ; *Jones v. Gurdon*, 2 Gale & D. 133 ; *Smith v. Eggington*, 7 Ad. & El. 167 ; *Mitchell v. Forster*, 12 A. & E. 72 ; *Bird v. Jones*, 7 Q. B. 742 ; *Turner v. Ambler*, 10 Q. B. 252.

(*s*) 2 Inst. 589.

detention may be actual,—*e.g.*, laying hands upon a person; or constructive,—*e.g.*, by an officer telling anyone he is wanted, and making him accompany him (*t*). There must be some restraint, although not necessarily incarceration; but the restraint must be total,—a mere partial restraint not being sufficient (*u*). Further, in order to constitute unlawful or false imprisonment, the detention must be without sufficient authority,—which authority may arise, either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment,—or from some other special cause warranting an arrest for the necessity of the thing,—such as where a felon is arrested in the act by a private person without warrant. False imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday; for the statute 29 Car. II. c. 7, s. 6, hath declared, that such service, except in cases of treason, felony, breach of the peace, or other indictable offence, shall be void (*x*).

Secondly, INJURIES AFFECTING RIGHTS OF PROPERTY.

We arrive next at the consideration of such injuries as affect the right of *property*: and we will consider, in the first place, injuries to real property; and, secondly, injuries to personal property.

(I.) And, firstly, Injuries to real property, being the six following, namely:—1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; and 6. Disturbance,—and we shall explain each of these six injuries in the order we have enumerated them.

(*t*) *Grainger v. Hill*, 4 Bing. N. C. 212.

(*x*) *Rawlins v. Ellis*, 16 Mee. & W. 172.

(*u*) *Bird v. Jones*, 7 Q. B. 742.

[1. OUSTER is an injury sustained in respect of hereditaments either corporeal or incorporeal ; but with regard to incorporeal hereditaments, ouster is nothing more than a disturbance of the enjoyment, and it amounted to an ouster, only if the owner elected so to treat it (*y*),—and damages were, in general, the only relief available for an incorporeal ouster (*a*),—but for an advowson, a real action (that of *quare impedit*) would lie (*b*).

Ouster (meaning ouster from *corporeal* hereditaments) may be either of the *freehold*, or of *chattels real* ; and—

Firstly, Ouster of the FREEHOLD :—This may be effected in four several ways :—1. By *abatement*,—which is where a person dies seised of an inheritance, and (*before the heir or devisee enters*) a stranger who has no right makes entry,—this his entry being called an abatement, and he himself being called an abator (*c*). 2. By *intrusion*,—which is the entry of a stranger, *after a particular estate of freehold is determined, before him in remainder or reversion*,—such stranger being termed an intruder (*d*). 3. By *disseisin*,—which is a wrongful putting out of him that is seised of the freehold,—not, as in the other cases, a wrongful entry where the possession was vacant, but an attack upon him who is in actual possession, and turning him out of it ; and as the two former kinds were an ouster from a freehold in law, so this is an ouster from a freehold in deed (*e*). 4. By *deforcement*,—which (in its most extensive sense) signifies the holding of any lands or tenements to which another person hath the right (*f*),—so that deforcement includes

(*y*) 3 Bl. Com. p. 170 ; Co. Litt. 199 b, 373 b ; *Steadman v. Smith*, 8 Ell. & Bl. 1.

(*a*) *Challenor v. Thomas*, Yelv. 143.

(*b*) See “ *Disturbance*,” *infra*.

(*c*) Finch, L. 195.

(*d*) Co. Litt. 277 ; F. N. B. 203, 204.

(*e*) *Taylor v. Horde*, 1 Ld. Ken. 143 ; *Doe d. Maddock v. Lynes*, 3 B. & C. 388 ; *Doe v. Hall*, 2 Dow. & Ry. 38 ; *Williams v. Thomas*, 12 East, 141.

(*f*) Co. Litt. 277 ; Co. Litt. by Butl. 331 b, n. (1).

[as well an abatement, an intrusion, or a disseisin, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession ; but, as contradistinguished from the particular ousters previously described, it imports such a detainer of the freehold from him that hath the right of property, but never had any possession under that right, as falls within none of the injuries which we have before explained,—*e.g.*, where lands escheat, *propter defectum sanguinis*, to the lord of a seignory, but the seisin of the lands is withheld from him,—here the injury is not *abatement*, for the right vests not in the lord as heir or devisee ; nor is it *intrusion*, for it vests not in him who hath the remainder or reversion ; nor is it *disseisin*, for the lord was never actually possessed ; and being none of these three, it is therefore a *deforcement* (*g*). Again, if a man lease lands to another, for a term of years or for the life of a third person,—and the term expires by surrender, or by efflux of time, or by the death of the *cestui que vie* ; and the lessee or any stranger who was (at the expiration of the term) in possession, holds over, and refuses to deliver the possession to him in remainder or reversion,—this is likewise a *deforcement* (*h*). Another species of *deforcement* is, where two persons have the same title to land, and one of them enters and keeps possession against the other,—as where the ancestor dies seised of an estate in fee simple, which descends to two sisters as coparceners ; and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety,—this is also a *deforcement* (*i*). And in addition to all the above modes of ouster, there was formerly another, viz., 5. *Discontinuance* (*k*),—which was where a tenant in tail in possession made a feoffment in fee simple, and created thereby, in fact, a fee simple,—but a *tortious* one,—he

(*g*) F. N. B. 143.(*i*) Finch, L. 293, 294 ; F. N. B.(*h*) Finch, L. 263 ; F. N. B.

197 ; Co. Litt. 199 b.

201, 205—7.

(*k*) Co. Litt. 327 b.

[injured the heir-in-tail or (as the case might be) the remainderman, taking away (or *tolling*) his right of entry;] but by the 3 & 4 Will. IV. c. 27, this doctrine of tolling the right of entry has been abolished, and by the 8 & 9 Vict. c. 106, s. 4, a feoffment made after the 1st October, 1845, has now no tortious operation,—so that discontinuance, as a species of ouster, has ceased to exist.

Secondly, [Ouster of CHATTELS REAL :—This is of two species, being either (1) Amotion from the possession of estates held by statute, recognizance, or elegit, before the estate of the tenant has been determined,—that is to say, before the sum has been raised for which the estate was given as a security ; or (2) Amotion from the possession of an estate for years,—which also takes place by a like kind of disseisin, ejection, or turning out of the tenant from the occupation of the land before his term has determined.

In the case of abatement, intrusion, and disseisin, the party ousted might have recovered the possession either (1) by an action *possessory*,—brought to determine the right of possession ; or (2) by an action *droitural*,—brought to determine the right of property (*l*) ; but as the abator (intruder or disseisor) had a mere naked possession without right, the law also gave the injured party (*while the adverse possession was recent*) the extra-judicial remedy by *entry*. But if the abator (intruder or disseisor) died seised, and the land descended to his heir,—or if the ouster was by deforcement,—the heir or (as the case might be) the deforciant was considered to have acquired the *apparent right of possession* (*m*),—*scil.*, because the heir (in respect of the descent) and the deforciant (in respect of the lawful inception of his title)

(*l*) 2 Bl. Com. 197 ; 3 Bl. Com. 179, 185.

(*m*) 2 Bl. Com. 196 ; 3 Bl. Com. 179.

had evidently a better or more colourable right than that gained by mere abatement, intrusion, or disseisin ; and, therefore, were not liable to expulsion by mere entry, but the estate or interest of the person ousted was said to be *turned to a right (n)*,—and this obliged him to resort to his real action (possessory or *droitural*) ; and even as against the abator, intruder, or disseisor himself, he would have lost his entry and been driven to his real action, if he had permitted the twenty years to run by, which were prescribed by the 21 Jac. I. c. 16, for his remedy by *entry*.

The claimant, if he commenced his real action *possessory*, might have sued out either a writ of *entry* or a writ of *assize*,—in the former showing merely the unlawful commencement of the adverse title, and in the latter proving also his own title ; but if he neglected to sue out either of those two writs, within the period of time allowed in that behalf,—or if judgment (although by default) was given against him in his possessory action ; or if the ouster had taken place upon a discontinuance,—the adverse party was considered as having acquired *an actual right of possession (o)*, and the claimant was thereafter driven to his real action *droitural (p)*. And of such *droitural* actions, the principal one was the *writ of right (q)*,—sometimes called the *writ of right proper*,—which writ was esteemed “the highest writ of the law” (*r*) ; but there were other writs *in the nature* of writs of right,—such as the writ of *formedon*, which was the remedy for tenant in tail on a discontinuance (*s*) ; and the writ of dower *unde nihil habet*, which was the remedy of a dowress to

(n) Co. Litt. by Butl. 332 b,
n. (1)

(o) 2 Bl. Com. 196 ; 3 Bl. Com.
179, 191.

(p) 2 Bl. Com. 197.

(q) *Davies v. Lowndes*, 1 C. B.
435 ; 3 C. B. 808.

(r) 3 Bl. Com. 193.

(s) 3 Bl. Com. 191 ; *Tolson v. Kaye*, 6 Man. & G. 536 ; *Cannon v. Rimington*, 12 C. B. 1, 515.

whom dower had not been assigned (*t*). And these real actions droitual were all subject (like real actions possessory) to a certain period of limitation, that for the writ of right being sixty years ; and it was competent to the defendant in a writ of right, to plead that he had more right to hold than the plaintiff had to claim,—which was called the *mise* upon the mere right ; and this issue he might have referred, either to the *grand assize* or to *trial by battle* (*u*).

Real actions (whether possessory or droitual) were deemed unacceptable remedies, the course of proceedings in them being dilatory and intricate (*x*), and the judgment conclusive,—so that the plaintiff, failing by any accident in one, was not at liberty to bring another (*y*) ; and they could be brought only in the Court of Common Pleas (*z*) ; and the *personal* action of trespass *de ejectione firmæ*,—afterwards compendiously called an *ejectment*,—came therefore to be resorted to in lieu of the *real* action. But if the claimant had lost his right of *entry*, he could not have resorted to an *ejectment*,—for the right to eject implied the right to recover the possession which had been recently disturbed (*a*), as well as damages for the disturbance,—but the remedy by *real* action (possessory or droitual) continued available in such a case,—until, by the 3 & 4 Will. IV. c. 27, real and mixed actions as a class (with the one or two exceptions already specified) were swept away ; and it was thereby enacted (*inter alia*), that, unless in the cases of disability therein mentioned, *no entry should be made, or action brought*, to recover land, but within twenty years after the right accrued,—a period

(*t*) 2 Wms. by Saund., 44 *e* ; 3 & 4 Will. 4, c. 27, s. 41 ; 23 & 24 Vict. c. 126 ; *Hetherington v. Graham*, 6 Bing. 135 ; *Watson v. Watson*, 10 C. B. 3.

(*u*) *Vide post*, vol. iv. bk. vi. ch. xviii.

(*x*) 3 Bl. Com. 184, 205 ; Hist. Eng. L. by Reeves, vol. iv. p. 166.

(*y*) Reeves, vol. iv. p. 166.

(*z*) *Ibid.* 170.

(*a*) 3 Bl. Com. 200 ; Hist. Eng. L. by Reeves, vol. iii. p. 390 ; vol. iv. p. 165.

which has since been shortened to that of *twelve* years, by the 37 & 38 Vict. c. 57.

The *present* mode of proceeding for the recovery of the possession of land,—*scil.*, of hereditaments corporeal,—is either by entry or by ejectment, the remedy by ejectment being now (sometimes) called an action for the recovery of the possession of land ; and by the effect of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and of the Judicature Acts, this action is commenced and prosecuted (and also concluded) in every respect like any other ordinary action in the High Court of Justice,—that is to say, it is commenced by writ of summons (*b*), and the usual pleadings (statement of claim, defence, and reply) follow,—unless where the indorsement of claim on the writ expresses that in case the defendant appears to it the plaintiff intends to proceed to trial without pleadings (*c*),—and after that, come the trial, judgment, and execution (*d*).

(*b*) Order xviii. rule 2.

(*c*) Order xviii. A.

(*d*) Prior to the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), the action commenced with a “ declaration,” complaining at the suit of a fictitious plaintiff (for example, John Doe), against a fictitious defendant (for example, Richard Roe), that a lease for a term of years having been made to Doe by the real claimant, and Doe having entered thereupon, the defendant Roe ousted him,—for which Doe claimed damages ; and subjoined was a *notice to appear* addressed to the real tenant in possession, by name, informing him that he (Roe) was sued as a *casual ejector* only, and had no title to the premises and would make no defence ; and therefore

advising him to appear in court, in the next Term, and defend his title, otherwise he (Roe) would suffer judgment to be had against him, and thereby the party addressed would be turned out of possession. And, on receipt of this friendly caution, if the tenant in possession did not in due time take the proper steps to be admitted defendant in the stead of Roe, he was supposed to have no right at all ; and upon judgment being had against Roe, the casual ejector, the real tenant would be turned out of possession by the sheriff. In the next Term, however, after the service of the declaration, the real tenant had the opportunity of procuring himself to be made defendant ; for in the course of that Term, the real

The remedy by ejectment above described was and is the form of proceeding when a stranger or third party (usually called the claimant) is proceeding to recover land ; but the remedy by ejectment is available (and with further material simplifications) in favour also of a landlord seeking to recover the possession of land from his own tenant of such land or from the sub-tenant of that tenant,—a specially indorsed writ being, in general, available in such a case, as is more fully explained in the next chapter.

And here we must take notice of certain legislative provisions in favour of *landlords*, bringing actions of

claimant (now called the *lessor of the plaintiff*) moved the court, in the name of Doe the fictitious plaintiff, for a rule for *judgment against the casual ejector*,—upon which motion, supported by an affidavit of the due service of the declaration, the court made a rule as of course for such judgment, unless the tenant in possession should appear and plead to issue, within the time therein mentioned. And within that time such tenant signed, (by his attorney,) what is called a *consent rule*,—binding him to confess, upon the trial of the cause, that he was at the time of the declaration in possession of the premises therein mentioned, or of part of them ; and also to confess the *lease* made by the lessor of the plaintiff, the *entry* of the plaintiff, and the *ouster* by himself the tenant in possession ; and upon such consent rule being signed, the tenant in possession was allowed by the court to enter an appearance in his own

name, and to plead the general issue (*not guilty*) ; and the issue was then made up, and was sent down to trial, as in an action at the suit of Doe (plaintiff), on the demise of A. B. (the lessor of the plaintiff), against C. D. (the tenant in possession). And it is manifest,—that under these circumstances, the matter to be tried (*i.e.*, the real and substantial question in the cause) would turn merely upon the point, whether the lessor of the plaintiff had a good *title* to demise, on the day of the supposed demise stated in the declaration ; and the lessor of the plaintiff was bound to make out a clear title,—otherwise his fictitious lessee could not obtain judgment for possession of the land ; but if the lessor did make out his title in a satisfactory manner, then judgment was given for John Doe, the nominal plaintiff, the right of A. B. (his supposed lessor) being proved ; and upon that judgment, a writ of possession issued.

ejectment against their tenants or defending such actions when brought against their tenants by strangers.

And, Firstly, by the 15 & 16 Vict. c. 76, s. 209 (re-enacting a similar provision contained in the 11 Geo. II. c. 19, s. 12), all tenants must, on pain of forfeiting three years' rent, give notice to their landlords of any writ in ejectment delivered to them, or coming to their knowledge.

Secondly, by the 15 & 16 Vict. c. 76, s. 210, (re-enacting in substance the 4 Geo. II. c. 28, s. 2,) in all cases of ejectment between landlord and tenant, if half a year's rent be in arrear (*e*), and there be a right to re-enter for the non-payment (*f*), and no sufficient distress be found (*g*), the landlord may, without any prior *demand* of possession (*h*), serve a writ in ejectment for the recovery of the demised premises; and the judgment (with the execution thereon) in such an ejectment is final and conclusive,—unless the rent (with the full costs) is paid or tendered within six calendar months after the execution.

And, Thirdly, by the 4 Geo. II. c. 28, if any tenant for life or for years (or other person claiming under or by collusion with him) shall wilfully (*i*) hold over after the determination of the term,—and after demand of possession made, and notice in writing given by him to whom the remainder or reversion of the premises shall belong (*k*),—an action for *double* the yearly value, during the time he detains the land, shall lie against him; and by the 11 Geo. II. c. 19, s. 18, any tenant, with power to determine his lease, who shall give notice of his intention to quit, and shall not deliver up possession at the time he

(*e*) *Gretton v. Roe*, 4 C. B. 576.

(*f*) *Doe v. Bowditch*, 8 Q. B. 973.

(*g*) *Doe v. Wandlass*, 7 T. R. 117.

(*h*) *Duppa v. Mayo*, 1 Saund. Wms. 287.

(*i*) *Swinfen v. Bacon*, 6 H. & N. 184, 846.

(*k*) *Blatchford v. Cole*, 5 C. B. (N.S.) 514; *Southport Tramways v. Gandy*, [1897] 2 Q. B. 66.

mentions, shall pay (in like manner) *double* his former rent for such time as he continues thenceforth in possession (*l*). And in order to give landlords, as against their tenants holding over (where the property is of small value), the option of a cheaper and more speedy remedy than that by action, it has been provided, by the 1 & 2 Vict. c. 74 (*m*), that a tenant at will (or for a term not exceeding seven years) without rent, or at a rent not exceeding 20*l.* a year, who (or the person occupying under him) shall fail to deliver up possession after his interest has ended or been duly determined, may be ejected (after being served with written notice) by a summary proceeding before *any two justices* of the district; but the warrant for possession will be stayed, if the tenant shall give security to bring an action to try the right, and to pay the costs in the event of judgment being given against him. Relief of the same kind, to a landlord against his tenant holding over, is also now afforded through the medium of the *county courts*,—not only in cases where the yearly value of the tenement is below 20*l.*, but also where such value does not exceed 50*l.* and upon which no fine or premium has been paid,—it being enacted, by the 51 & 52 Vict. c. 43, s. 59 (re-enacting a similar provision contained in the 19 & 20 Vict. c. 108, s. 50), that if the term and interest of the tenant shall have expired or determined by a legal notice to quit, and the tenant (or any person holding or claiming through him) shall neglect or refuse to deliver up possession accordingly, the landlord may enter a plaint in the county court of the district; and after judgment given in his favour, may obtain possession, through the high bailiff of the court (*n*), to whom a warrant may be issued for that

(*l*) *Wilkinson v. Colley*, 5 Burr. (N.S.) 166; *Rees v. Davies*, 4 C. B. 2694; *Soulsby v. Neving*, 9 East, (N.S.) 56; *Edwards v. Hodges*, 15 314; *Page v. Moore*, 15 Q. B. 684. C. B. 477.

(*m*) *Jones v. Chapman*, 14 Mee. & (n) *Hodson v. Walker*, Law Rep. W. 124; *Delaney v. Fox*, 1 C. B. 7 Exch. 55.

purpose by the registrar (o) ; but the defendant may have the action removed into the High Court, upon the ground (when such ground exists) that the title to lands of greater value will be affected by the decision (p).

It is to be remembered, however, as regards leases (and agreements for leases) within sect. 14 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), that before the lessor can proceed to recover the possession from the lessee (or his under-tenant) the notice by that section appointed must be first given by the lessor, and the tenant must have failed to comply with the exigencies of the notice ; but subject to the provisions of that section being complied with, the lessor may recover the possession in the usual way, and upon the usual grounds ; and when he is proceeding as for a forfeiture for breach of the lessee's covenant to repair, he will recover all the rent which shall have accrued due pending the currency of the notice,—and in fact, up to the last quarter day next before action commenced (q).

[2. TRESPASS,—otherwise called trespass *quare clausum fregit* :—The injury of trespass *quare clausum fregit*, was so called from the language of the writ of trespass (now disused), which commanded the defendant to show *quare clausum querentis fregit* (i.e., why he broke the plaintiff's close) ; and this breaking was an injury to the plaintiff, because every man's land is (in the eye of the law) inclosed and set apart from his neighbour's, for the *exclusive* use of himself. And in order to maintain this action, the plaintiff must have an actual possession by entry (r) ; and before entry and possession, he cannot maintain this

(o) *Jones v. Owen*, 5 D. & L. 669 ; *Harrington v. Ramsay*, 8 Exch. 879 ; 2 Ell. & Bl. 669.

(p) 51 & 52 Vict. c. 43, ss. 59—61.

(q) *Penton v. Barnett*, [1898] 1 Q. B. 276.

(r) 2 Roll. Abr. 553 ; *Lambert v. Stroother*, Willes, 221 ; Com. Dig. Trespass.

[action, though he may have the freehold in law (s). And therefore an heir, before entry, cannot have this action against an abator (t); and though a disseisee might have it against the disseisor,—for the injury done by the disseisin itself, at which time the plaintiff was seised of the land,—yet he cannot have it for any act done after the disseisin, until he hath re-gained the possession by re-entry; although he may then maintain it for the intermediate damage done, the possession so re-gained being, by a kind of *jus postliminii*, supposed to have all along continued in him (u). Neither, by the common law, in case of an intrusion or deforcement, could the party kept out of possession sue the wrongdoer in trespass; but, by the 6 Ann. c. 18, if a guardian or trustee for any infant, a husband seised *jure uxoris*, or a person having any estate or interest determinable upon a life or lives, shall (after the determination of their respective interests) hold over and continue in possession of the lands or tenements without the consent of the person entitled thereto, they are adjudged to be trespassers, and may be sued in trespass accordingly.

A man is answerable not only for his own trespass, but for that of his cattle also,—for if, by his negligent keeping, they stray upon the land of another (and much more if he drives them on), and they tread down his neighbour's herbage, or damage his cattle (v), this is a trespass for which the owner of the cattle committing the trespass must answer in damages; and the law gives to the party injured in this case a right also to distrain the cattle *damage feasant* (doing damage), till the owner shall make him satisfaction;] but if he distrain, he cannot (so long as

(s) 2 Roll. Abr. 553.

(t) *Ibid.*

(u) 11 Rep. 5; *Barnett v. Guildford*, 11 Exch. 19.

(v) *Boden v. Roscoe*, [1894] 1 Q. B. 608; and *vide supra*, pp. 275, 286.

he holds the distress) maintain also an action for damages (*x*).

In some cases, an entry on another's land is justifiable,—as where it is done in the exercise of a right of way, or the like ; or where a man enters to pay money there payable, or to execute (in a legal manner) the process of the law, or to get back his own goods or to distrain for rent (*y*). Also, a man may justify entering into a public inn without the leave of the owner first specially asked,—because when a man professes the keeping of a public inn, he thereby gives a general licence to any person to enter. And it has been said, that the common law warrants the hunting of ravenous beasts of prey (as badgers and foxes) in another man's land, if no greater damage be done than is necessary,—because the destroying such creatures may be profitable to the public (*z*) ; but fox-hunting, as a mere *diversion*, would not, *semble*, justify such an entry (*a*).

[Where a man makes an ill use of the authority with which the law thus intrusts him, he shall be accounted a trespasser *ab initio* (*b*) ; for if one comes into a tavern, and will not go out in a reasonable time, but tarries there all night, contrary to the inclinations of the owner,—this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass (*c*) ; but a bare nonfeasance, as not paying for the wine or beer he calls for, will not make him a trespasser,—for this is only a breach of contract. In like manner, if a landlord

(*x*) *Boden v. Roscoe*, [1894] 1 Q. B. 608 ; *Lehain v. Philpott*, Law Rep. 10 Exch. 242.

(*y*) *Patrick v. Colerick*, 3 M. & W. 485 ; *Keane v. Reynolds*, 2 E. & B. 748.

(*z*) *Geush v. Mynns*, Cro. Jac. 321 ; *Gundry v. Feltham*, 1 T. R. 334.

(*a*) *Paul v. Summerhays*, 4 Q. B. D. 9, citing *Essex v. Capel*, Chitty's Game Laws, p. 31.

(*b*) 8 Rep. 146 ; Finch, L. 47 ; *Bagshawe v. Goward*, Cro. Jac. 148.

(*c*) 2 Roll. Abr. 561.

[distrain cattle for rent and wilfully kill the distress, or commit any other irregularity, this by the common law made him a trespasser *ab initio* (*d*) ;] but this is now otherwise (*e*) ; and no officer of any county court executing a warrant of the court,—or any person at whose instance such warrant is executed,—is to be deemed a trespasser, by reason of an irregularity or informality in the warrant (or in the mode of executing same) or in any proceeding on the validity of which the warrant depends,—although, for any special damage, the party injured may have his action on the case (*f*).

[3. NUISANCE (*nocumentum*) signifies any thing that worketh hurt, inconvenience, or damage. And a nuisance is of two kinds, *i.e.*, either public or private ; and a *public* (or *common*) nuisance is one which affects the public, and is an annoyance to all the lieges,—for which reason it belongs to the class of public wrongs or crimes, and may be the subject of an indictment ; and, on the other hand, a *private* nuisance is (or may be defined as) anything done to the hurt or annoyance of another whereby he suffers more than the public at large (*g*) ; but a trespass to his field (even a continuing trespass) is not regarded as a nuisance (*h*),—*scil.*, because it is something more definite, namely, a trespass.]

Firstly, Private nuisances, the varieties of:—If a man so uses his land as to deprive me of the support necessary to retain my land or my house in its natural condition, or builds his house so close to mine that the roof overhangs my roof and the water flows off his roof on to mine, he commits a nuisance, for which an action will lie (*i*) ;

(*d*) Finch, L. 47.

(*h*) F. N. B. 188.

(*e*) *Vide sup.* pp. 286, 287.

(*i*) *Tod-Heatley v. Benham*, 40

(*f*) 51 & 52 Vict. c. 43, s. 52.

Ch. Div. 80.

(*g*) *Benjamin v. Storr*, Law Rep.

9 C. P. 400.

he also commits a nuisance if he obstructs the free passage of light or air coming to my house by a particular defined channel (*k*); and the case is the same, if the boughs of his tree are allowed to grow so as to overhang my land, which they had not before been accustomed to do (*l*). Also, if a person keeps his hogs (or other noisome animals) so near the house of another, previously built and inhabited, that the stench of them incommodes him, and makes the air unwholesome, this is a nuisance,—for it tends to deprive his neighbour of the use and benefit of his house (*m*): and the like injury arises, if any offensive trade, as a tanner's a tallow chandler's or a brick-maker's, be set up and exercised close to my land,—for though these are lawful and necessary trades, yet they should be exercised in remote places (*n*). And if one erects a smelting-house so near the land of another that the vapour and smoke thereof kill the corn and grass, that is a nuisance (*o*); and the case is the same, if a man, by carelessness in excavating his own ground, causes the fall of a house erected on the adjoining land (*p*). And it may be laid down generally, that if one does an act which is, in itself, lawful, but which, being done where it is done, necessarily tends to damage the land of another, that is a nuisance,—for it is incumbent on him to find some other place to do the act where it will be less offensive—the rule being (in this as well as in the other examples above given) *sic utere tuo, ut*

(*k*) *Bass v. Gregory*, 25 Q. B. D. 481; *Hall v. Lichfield Brewery Company*, 49 L. J. Ch. 655; *Yates v. Jack*, L. R. 1 Ch. 295.

(*l*) *Norris v. Baker*, 1 Roll. Rep. 393; *Lodie v. Arnold*, 2 Salk. 458.

(*m*) *Aldred's Case* 9 Rep. 58; *R. v. White*, 1. Burr. 337.

(*n*) *Morley v. Pragnel*, Cro. Car. 510; *Bamford v. Turnley*, 3 B. &

Smith, 62; *Crump v. Lambert*, Law Rep. 3 Eq. Ca. 409.

(*o*) 1 Roll. Abr. 89.

(*p*) *Humphries v. Brogden*, 12 Q. B. 739; *Bonomi v. Backhouse*, 1 Ell. Bl. & Ell. 622; *Fletcher v. Rylands*, Law Rep. 3 H. L. 330; *Smith v. Fletcher*, 2 App. Ca. 781; *Angus v. Dalton*, 6 App. Ca. 640.

alienum non lrdas (*q*). And a nuisance may arise by an omission even to perform a legal duty,—as if my neighbour is bound to scour a ditch and does not, whereby my land is overflowed (*r*) ; or if the owner of a fence abutting on a highway neglects his duty to repair the fence, and my child (an infant of four years of age) puts his foot on it, and it falls over upon him (*s*). But depriving one of a mere amenity,—as of a fine prospect,—by building a wall or the like, or opening a window,—is not an actionable nuisance (*t*) ; moreover, a nuisance may be legalised by statute,—*e.g.*, the vibration and noise caused by a railway,—and in such a case no damages are recoverable, but compensation may be recoverable (*u*).

And as regards *incorporeal* hereditaments, it is a nuisance to stop or divert natural surface water that ought to run to another's meadow or mill (*x*) ; and to pollute water flowing beneath another's land (*y*),—although it is not actionable to deprive your neighbour of underground water which percolates on to his land even though you act maliciously (*z*). If I have a way across another's land, and he obstructs me in the use of it, either by totally stopping it, or by putting logs across it, or by ploughing over it, it is in general a nuisance,—for in the first case, I cannot enjoy my right at all ; and in the latter, I cannot enjoy it so commodiously as I ought (*a*). And it is an

(*q*) *Firth v. Bowling Iron Co.*, 3 C. P. D. 254 ; *Broder v. Saillard*, 2 Ch. D. 692.

(*r*) 3 Bl. Com. 218, citing *F. N. B.* 184 ; *Humphries v. Cousins*, 2 C. P. D. 239.

(*s*) *Harrold v. Watney*, [1898] 2 Q. B. 320.

(*t*) 9 Rep. 58 ; *Tapling v. Jones*, 11 H. of L. 290 ; *Butt v. Imperial Gas Co.* Law Rep. 2 Ch. App. 158.

(*u*) *Hammersmith Rail. Co. v. Brand*, Law Rep. 4 H. L. Ca. 171 ; *London, Brighton, & South Coast Rail. Co. v. Truman*, 11 App. Ca. 45 ; *Sadler v. South Staffordshire Tramways*, 23 Q. B. D. 17.

(*x*) *F. N. B.* 184.

(*y*) *Ballard v. Tomlinson*, 29 Ch. D. 115.

(*z*) *Mayor of Bradford v. Pickles*, [1895] A. C. 587.

(*a*) *F. N. B.* 183.

actionable nuisance, if I am entitled to hold a fair, market, or ferry, and another person (unless under the authority of a special Act of Parliament enabling him so to do) (*b*) sets up a fair, market, or ferry so near mine that he does me a prejudice (*c*) ; but (for this purpose) it is necessary (1) That my market or fair be the elder,—otherwise the nuisance lies at my own door ; and (2) That the market be erected within the third part of twenty miles from mine,—for it is reasonable that every one should have a market within that distance (*d*).

Secondly, Private nuisances, the remedy for :—For a nuisance, the party injured may recover damages for the injury sustained ; and he may also (it may be recollected) have the right to *abate* the nuisance ; and in most cases, an injunction may also be obtained from the court,—to stay or prevent the nuisance, or to enforce its abatement by the wrong-doer himself,—the injunction in these cases being in the nature of the relief formerly obtainable in the real actions of *assize of nuisance* and *quod permittat prosternere* (*e*) ; and as regards certain varieties of nuisance, the sanitary authority will (by order) compel the summary abatement thereof.

4. WASTE is the spoil and destruction done (or permitted) by the tenant, to houses, woods, lands, or other corporeal hereditaments, during the continuance of his particular estate therein. [Whatever does a lasting damage to the freehold or inheritance is waste ; but if a house be destroyed by tempest, lightning, or the like (which is the act of Providence), it is no waste,—although if it be burned by the carelessness or negligence of the lessee, it is waste ;

(*b*) *Abergavenny Commissioners v. Straker*, 42 Ch. D. 83. 140 ; *Dorchester v. Ensor*, Law Rep. 4 Exch. 335.

(*c*) F. N. B. 184 ; 2 Roll. Abr. (*d*) Bl. Com. vol. iii. p. 210.
(*e*) 3 Bl. Com. 220.

[and (where the tenant is bound by covenant to keep the house in repair) he is compellable to rebuild, unless the contract was made expressly subject to the exception of damage by fire (*f*). Waste may also be committed in ponds, dove-houses, warrens, and the like,—by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance (*g*). “Timber” also is part of the inheritance (*h*),—oak, ash, and elm being timber in all places; and other trees (of a kind to be used for building) are, by the custom of particular counties, considered as timber (*i*); and to cut down timber trees, or to top them, or to do any other act whereby they may decay, is waste (*k*); but the tenant may cut down “underwood” at any seasonable time that he pleases (*l*); and he may also, of common right, take sufficient *estovers*, unless restrained by particular covenants or exceptions (*m*). Again, the conversion of land from one species to another, is waste; *e.g.*, to convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste (*n*),—for, as Sir Edward Coke observes, when such a close, which is conveyed and described as pasture, is found to be arable, it not only changes the course of husbandry, but affects also the evidence of the title to estates (*o*); and the same rule is observed, with regard to converting one species of *edifice* into another, even though it should thereby be improved in its value (*p*), waste of this improving character

(*f*) *Saner v. Bilton*, 7 Ch. D. 815.

(*g*) Co. Litt. 53.

(*h*) 4 Rep. 62.

(*i*) *Honywood v. Honywood*, L. R. 18 Eq. 306; *Phillips v. Smith*, 14 Mee. & W. 589; *Matthews v. Matthews*, 7 C. B. 1018.

(*k*) Co. Litt. *ubi sup.*

(*l*) 2 Roll. Abr. 817.

(*m*) Co. Litt. 41.

(*n*) *Lord Darcy v. Askwith*, Hob. 296.

(*o*) Co. Litt. 53.

(*p*) *Cole v. Green*, 1 Lev. 309; *Jones v. Chappell*, Law Rep. 20 Eq. Ca. 539; *Doherty v. Allman*, 3 App. Ca. 709.

[being known in law as ameliorative waste. Moreover, to open new mines of metal, coal, and the like, is waste,—for it is a detriment to the inheritance (*q*) ; but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use (*r*).] And, in general, any acts or neglects hurtful to the inheritance, are wrongful on the part of a tenant who has an estate less than the inheritance ; but a tenant in fee is not impeachable for waste ; nor a tenant in tail,—even where he is tenant in tail after possibility of issue extinct ; and the same doctrine formerly obtained at law, with reference to an estate *for life*,—provided the estate were limited without impeachment of waste. It is also esteemed waste, if there is a wood subject to the right of estovers, and the owner of the wood demolishes the whole wood, whereby he destroys the possibility of estovers (*s*). The law, however, does not regard any act, by whomsoever committed, as amounting to waste, unless there be some *substantial* and considerable damage (*t*),—assuming always that the waste does not prejudice the evidence of the title.

The remedy for waste is by action for an injunction, to stay impending or continuing waste, and for damages in respect of the waste already committed (*u*) ; and the action lies not only against the tenant, but against any stranger by whom the waste has been (or is being) committed ; and it lies at the suit of one joint tenant (or tenant in

(*q*) 5 Rep. 12.

(*r*) *Lord Darcy v. Askwith*, Hob. 296.

(*s*) 3 Bl. Com. 224 ; *Chilton v. Corporation of London*, 7 Ch. Div. 562.

(*t*) *Doe d. Grubb v. Lord Burlington*, 5 B. & Ad. 507 ; *The Governors, etc. of Harrow School v. Alderton*, 2 Bos. & Pul. 86.

(*u*) Prior to the abolition of

real and mixed actions, by the 3 & 4 Will. 4, c. 27, there was also the mixed action of *waste*, by which both the demised premises and damages for the waste might have been recovered ; and (in aid of that action) there was the writ of *estrepement*,—to prevent the commission (or continuance) of the injury *pendente lite*.

common) against the other or others (*x*). And (as will be remembered) an action for *dilapidations* (which is ecclesiastical waste) may be maintained by a rector or vicar against his predecessor (or against the executors of his predecessor),—it being held that the incumbent of a living is bound to keep the parsonage house and the chancel of the church in good and substantial repair, restoring and rebuilding where necessary.

5. SUBTRACTION is where (or happens when) any person who owes suit, duty, custom, or other service to another, withdraws or neglects to perform it (*y*). *Fealty* and *suit of court* were among the conditions upon which the antient lords granted out their lands to their feudatories; and of the same nature also were such *rents* as fell under the legal denomination of rents service, which rents were the stated returns due (either by antient or modern reservation) from the tenant to his lord, whether in provisions, arms, or the like, or in money; and the non-observance of any of the conditions of the grant, was an injury to the freehold of the lord, diminishing the value of the seignior, and was called the injury of *subtraction*. Besides which, there arises, whenever *rent* becomes due, a *debt* between the parties, —the non-payment of which is a pecuniary injury independent of the wrong done to the freehold. For the withholding of fealty and suit of court, and in general for the withholding of all rents, there is the peculiar remedy by distress, of which we have already treated; and a distress is the only remedy for fealty and suit of court; but to recover rent, there is also the remedy by action (*z*). And

(*x*) 1 Chit. Gen. Pr. 272.

(*y*) 3 Bl. Com. 230.

(*z*) *Thomas v. Sylvester*, Law Rep. 8. Q. B. 368; *Searle v. Cooke*, 43 Ch. D. 510. The *real actions* (now abolished) which were available for the recovery of rent in

arrears, were the assizes of *mort d'ancestor* and of *novel disseisin*, the writ *de consuetudinibus et servitiis*, and the writ of right *sur disclaimer* (Roscoe on Real Actions, 31, 32, 63, 75); and the *real actions* (also now abolished)

[as regards *customary services*, the one of most frequent occurrence is that of doing suit to the lord's mill ; for where, by usage, the persons resident in a particular place have, time out of mind, been accustomed to grind their corn at a certain mill, and any of them go to another mill and withdraw their suit from the antient mill, that is both a damage and an injury to the owner (*a*),—because this custom might have a very reasonable foundation,—namely, in the erection of such mill by the ancestors of the owner, for the convenience of the inhabitants and on the condition that when erected, they should grind their corn there only ; and, for this injury, the owner may bring his action and recover damages (*b*).]

6. DISTURBANCE is the wrongful obstruction of the owner of an incorporeal hereditament in his enjoyment thereof ; and there are *six* principal species of this injury, namely :—disturbance of *franchise*, disturbance of *common*, disturbance of *fishery*, disturbance of *ways*, disturbance of *tenure*, and disturbance of *patronage*.

[Disturbance of *franchise* happens when a man who has any species of franchise, as of holding a court leet, of keeping a fair or market or ferry, of free warren, of taking toll, of seizing waifs or estrays, or the like, is disturbed or incommoded in the lawful exercise thereof (*c*). As if another, by menaces or persuasions, prevails upon the

which were available to redress the oppressions of the lord, were the writ *ne injustè vexes* and the writ of *mesne* (Roscoe on Real Actions, 37, 38).

(*a*) *Harbin v. Green*, Hob. 233 ; *Drake v. Wigglesworth*, Willes, 654.

(*b*) *Vyryan v. Arthur*, 1 B. & C. 410 ; *Richardson v. Walker*, 2 B. & C. 827. Formerly, the person

injured was enabled to compel the specific performance of the service withdrawn, by the writs (all now abolished) *de sectâ ad molendinum*, *ad furnum*, *ad torrale*, and the like. (F. N. B. 123 ; Roscoe on Real Actions, 36.)

(*c*) As to *ferries*, see *Hopkins v. Great Northern Railway Company*, 2 Q. B. D. 224 ; and as to

[suitors not to appear at my court ; or obstructs the passage to my fair or market (*d*) ; or sets up a new ferry, or erects a bridge close to my ferry, whereby I lose custom ; or hunts in my free warren ; or refuses to pay me the accustomed toll ; or hinders me from seizing the waif or estray, whereby it escapes or is carried out of my liberty,—in every case of this kind, there is an injury done to the legal owner : his property is damnified, the profits arising from his franchise being diminished ; to remedy which, he is entitled to sue for damages, or, in case of the refusal to pay toll, may take a distress if he pleases (*e*).

Disturbance of *common* is, where any act is done by which the right of common of another is incommoded or diminished ; and this may happen in these three ways, that is to say :—(1.) Where one who hath no right of common puts his cattle into the land,—and thereby robs the cattle of the commoners of their respective shares of the pasture ; or where one, who hath a right of common, puts in cattle which are not commonable, as hogs and goats,—which amounts to the same inconvenience. But the lord of the soil may, by custom or prescription (but not without), put a stranger's cattle into the common (*f*) : and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common (*g*). In general, however, if the beasts of a stranger, or the uncommonable cattle of a commoner, be found upon the land, the lord, or any of the commoners, may either distrain them *damage feasant* (*h*), or bring their respective actions and recover damages. (2.) Another

fairs and markets, see *Att.-Gen. v. Horner*, 14 Q. B. D. 245 ; *Great Eastern Railway Company v. Goldsmid*, 9 App. Ca. 927.

(*d*) *Dorchester v. Ensor*, Law Rep. 4 Exch. 335.

(*e*) *Heddy v. Wheelhouse*, Cro. Eliz. 558.

(*f*) 1 Roll. Ab. 396.

(*g*) Co. Litt. 122.

(*h*) 9 Rep. 112.

[disturbance of common is by *surcharging* it,—that is to say, putting more cattle thereon than the pasture and herbage will sustain, or the party hath a right to do,—in which case, he that surcharges does an injury to the rest of the owners, by depriving them of their respective portions, or at least contracting them into a smaller compass. This injury by surcharging can, properly speaking, only happen,—where the right of common is appendant or appurtenant, and of course limitable by law ; or where, when in gross, it is expressly limited and certain, —for where a man hath (if he can have) common in gross *sans nombre* or *without stint*, as it is more commonly called, he cannot be a surcharger ; however, even where a man is said to have common without stint, there must be left sufficient for the lord's own beasts,—for the law will not suppose that, at the original grant of the right of common, the lord meant to exclude himself (*i*). For surcharging the common, the beasts in excess may be distrained, or any of the commoners may bring his action,—and that as well against the lord as against another commoner (*k*). (3.) There is also a disturbance of common, when the owner of the land (or other person) so incloses it, that the commoner is precluded from enjoying the benefit to which he is by law entitled,—which may be done either by erecting fences ; or by ploughing up the soil of the common (*l*) ;] or by erecting a warren in the common and stocking it with rabbits in such quantities that they devour the whole herbage,—but the lord may lawfully erect a warren, provided the rabbits do not increase so as to occasion this inconvenience (*m*). For each of these

(*i*) 1 Roll. Ab. 399.

(*k*) Freem. 273 ; 1 Saund. by Wms. 346, n. (2). Until the general abolition of real actions, there was also the *writ of admeasurement of pasture* ; as to which, see F. N. B. 126.

(*l*) *Leverett v. Townshend*, Cro. Eliz. 198.

(*m*) *Bellew v. Langdon*, Cro. Eliz. 876 ; *Hadesden v. Gryssel*, Cro. Jac. 195 ; *Farrer v. Nelson*, 15 Q. B. D. 258.

injuries the commoner may have his action (*n*) ; and, in certain instances, he may *abate* the obstruction,—*e.g.*, where it is a house or a fence (*o*) ; but he may not cut down trees wrongfully planted by the lord, or kill his rabbits destroying the common, or even fill up the coney-burrows,—his remedy in such latter cases being by action only (*p*).

Disturbance of *fishery* is where a person fishes in another's fishery, or disturbs or drives away or destroys the fish, or diverts the water flowing to the fishery to an unreasonable extent, or prevents the fish from reaching the fishery (*q*).

[Disturbance of *ways* is where a person who hath a right of way over another's grounds is obstructed by enclosures or other obstacles,—by which means, he cannot enjoy his right of way (or, at least, not in so commodious a manner as he might have done) ; and the remedy is either by abating the obstruction (where abatement is possible), or else by action for an injunction and damages.

Disturbance of *tenure* is where the relation which subsists between the lord and his tenant is dissolved by the wrongful act of a third person,—the driving away of a tenant from off his estate being an injury of no small consequence ; and therefore, if there be a tenant at will of any lands or tenements, and a stranger (by menaces and threats, or by unlawful distresses, or by fraud and circumvention, or other means) contrives to drive him away, or inveigles him into leaving his tenancy,—this the

(*n*) Before the abolition of real actions, he was also entitled to the writ of *novel disseisin* or *quod permittat* ; as to which, see 3 Bl. Com. p. 22 ; Roscoe on Real Actions, p. 40.

(*o*) *Davies v. Williams*, 16 Q. B. 556 ; *Lane v. Capsey*, [1891] 3 Ch. 411 ; *Mason v. Caesar*, 2 Mod. 66.

(*p*) 1 Saund. by Wms. 353 a.

(*q*) *Vide* vol. I. pp. 475, 476.

[law construes to be a wrong to the lord, and gives him an action whereby he may obtain damages against the offender (*r*).

Disturbance of *patronage* is hindering or obstructing the patron in the presentation of his clerk to a benefice ; and this injury was distinguished, at the common law, from *usurpation*,—the latter being where a stranger that hath no right presenteth a clerk who is admitted and instituted (*s*). The injury of usurpation was anciently very serious,—seeing that the patron was, by the common law, absolutely ousted and dispossessed thereby, losing not only his turn of presenting *pro hac vice*, but losing also the absolute and perpetual inheritance of the advowson, and for the recovery of which he was, therefore, obliged to resort to his remedy by *writ of right of advowson* ; and until he had so recovered his right of advowson, he could not, upon the next avoidance, present to the living (*t*). However, by the statute of Westminster the Second (13 Edw. I.), c. 5, s. 2, if either the possessory action of *quare impedit* (which was the general action) or the assize of *darreign presentment* (which was available only for a patron entitled by *descent*) (*u*) was brought within six months after the avoidance, the patron was entitled, notwithstanding the usurpation, to recover the then presentation, and he thereby recovered his seisin also of the advowson ; but if the true patron omitted to bring his action within the six months, the seisin remained with the usurper ; and the patron, to recover it, was still driven to his writ of right,—to remedy which, it was enacted, by the 7 Ann. c. 18, that no usurpation should displace the estate or interest of the patron, or turn it to a mere right ;

(*r*) Hal. Anal. ch. 40 ; 1 Roll. Ab. 108.

(*t*) 6 Rep. 49 ; F. N. B. 30.

(*s*) Co. Litt. 277 ; *Keen v. Denny*, [1894] 3 Ch. 169.

(*u*) 3 Bl. Com. 245.

[but that the true patron might present, upon the next avoidance, as if no such usurpation had happened (*x*).

Upon the vacancy of a living, if the presentation to it be made within the six calendar months which are allowed to the patron in that behalf, the bishop is bound to admit and institute the clerk, being otherwise sufficient ; but if two presentations be offered to the bishop upon the same avoidance, the church is then said to become *litigious* ; and although the bishop may suspend the admission of either, and so suffer a lapse to occur,—yet if either patron or either clerk request him to award a *jus patronatûs*, he is bound to do it,—a *jus patronatûs* being a commission from the bishop, directed to his chancellor (and to others of competent learning), and requiring them to summon a jury of six clergymen and six laymen for the purpose of enquiring who is the rightful patron ; and if, upon the result of such inquiry, the bishop admits and institutes the clerk of that patron whom they return as the rightful patron, he secures himself from being a disturber, whatever proceedings may be had afterwards in the temporal courts (*y*) ; and the clerk who is refused by the bishop has his remedy in the spiritual court, by *duplex querela*,—this remedy being a complaint in the nature of an appeal from the ordinary to his next immediate superior, *e.g.*, from the bishop to the archbishop (*z*), with an ultimate right of appeal to the Privy Council (*a*) ; and if the court of appeal adjudge the cause of refusal to be insufficient, it will grant institution to the appellant.

But, apparently, the remedy by *duplex querela* in the spiritual court may not proceed concurrently with the remedy by *quare impedit* in the temporal court (*b*) ; and

(*x*) *Robinson v. Marquis of Bristol*, 20 L. J. C. P. 208.

(*y*) 1 Burn. 24.

(*z*) *Ibid.* 159.

(*a*) *Gorham v. Bishop of Exeter*, 15 Q. B. 52.

(*b*) *Walsh v. Bishop of Lincoln*, Law Rep. 4 Adm. & Eccl. 242.

[the usual course in fact is, that upon the first delay or refusal of the bishop to admit his clerk, the adverse patron usually brings his *quare impedit* for the temporal injury done to his property, in disturbing him in his presentation,—the patron, and not the clerk, being in all cases the plaintiff in *quare impedit*; and the defendants to this action are the pretending patron and his clerk and the ordinary,—where all three of them are the disturbers; and although, where the delay arises from the bishop alone (as upon pretence of incapacity or the like), he only is the defendant, yet if there is another presentation set up, the pretending patron and his clerk must be added as co-defendants with the bishop (c).]

The action of *quare impedit* used formerly to be commenced by original writ, returnable (as a general rule) in the Court of Common Pleas only (d); and the writ directed the sheriff to command the defendants who disturbed the presentation (that is, in general, the bishop, patron, and clerk) to permit the plaintiff to present a fit person (without specifying whom) to the vacant church which he claimed to be in his gift, or else to show *why they hindered him* (e); but, by the Common Law Procedure Act, 1860

(c) 7 Rep. 25; *Lancaster v. Lowe*, Cro. Jac. 93; *Elvis v. Archbishop of York*, Hob. 392.

(d) *Tolson v. Bishop of Carlisle*, 3 C. B. 41; 5 C. B. 761; *Dyversité des Courtes*, ch. Bank le Roi.

(e) “Immediately on the suing out of the *quare impedit*,” says Blackstone (vol. iii. p. 248), “if the plaintiff suspects that the bishop will admit the defendant or any other clerk pending the suit, he may have a prohibitory writ called *ne admittas*”; and “if the bishop doth, after the receipt of this writ, admit any person, even

“ though the patron’s right may
“ have been found in a *jus patro-*
“ *natús*, then the plaintiff, after he
“ has obtained judgment in the
“ *quare impedit*, may remove the
“ incumbent, if the clerk of a
“ stranger, by *scire facias*, and
“ shall have a special action
“ against the bishop, called a *quare*
“ *incumbravit*, to recover the pre-
“ sentation, and also satisfaction
“ in damages for the injury done
“ him by incumbering the church
“ with a clerk pending the suit,
“ and after the *ne admittas*
“ received.”

(23 & 24 Vict. c. 126), s. 27, the action of *quare impedit* might be commenced by ordinary writ of summons issuing out of the Common Pleas ; and the proceedings on the writ were assimilated to the proceedings in an ordinary action ; and that continues so, under the Judicature Acts (*f*).

The plaintiff in this action should, in his statement of claim, allege a title in himself or his ancestors (or in those under whom he claims),—an actual presentation under that title,—and a disturbance before action brought (*g*) ; and after delivery of the statement of claim, the bishop and the clerk usually disclaim all title,—save only, the one as *ordinary* to admit and institute, and the other as presentee of the patron ; and the patron alone is therefore left to defend the right (*h*). Indeed, it was a rule at the common law, that neither the ordinary nor the clerk should plead to the right of patronage ; but, by the 25 Edw. III. st. 6, c. 7, the ordinary was enabled to plead thereto,—provided he had himself collated by lapse ; and the clerk also was enabled to plead thereto,—provided he had been collated, or presented and instituted (*i*) ; and if they meant to deny that they had obstructed the presentation, they might so frame their defence (*k*),—and such (in effect) is still the rule. But the bishop may, of course, also defend, on the ground that the clerk presented by the plaintiff was unfit, for want of learning or otherwise, to be instituted (*l*).

(*f*) Append. A. pt. iii. (1883).

(*g*) *Brickhead v. Archbishop of York*, Hob. 250.

(*h*) 3 Bl. Com. 249.

(*i*) 7 Rep. 26 a ; *Storie v. Bishop of Winchester*, 9 C. B. 62 ; 17 C. B. 653 ; Roscoe on Real Actions, 231, 239, 241.

(*k*) The mode of raising such defence has been to plead *ne dis-*

turba pas, which was the general issue in *quare impedit* ; but see now Ord. xix. (1883), r. 15.

(*l*) *Bishop of Exeter v. Marshall*, 3 App. Cas. 17 ; *Heywood v. Bishop of Manchester*, 12 Q. B. D. 404 ; *Abergavenny (Marquis) v. Llandaff (Bishop)*, 20 Q. B. D. 460 ; 61 & 62 Vict. c. 48 (Benefices Act, 1898), s. 2.

The defendant patron may rely also on the defence of *plenarty*,—viz., that, by virtue of his own presentation, the church was full for six calendar months before the issue of the writ (*m*) ; or, if he desires only to deny that he has obstructed the presentation, he may plead simply that he did not obstruct it (*n*) ; and he may also traverse the title alleged by the plaintiff. But inasmuch as, in a *quare impedit*, both parties are in a manner plaintiffs, and either of them entitled to a judgment that he recover the presentation, and have a writ to the bishop for the admission of his clerk, therefore, if the defendant patron wishes to obtain a judgment of this description, and not merely a judgment discharging him from the action, he must, in addition to the traverse, set forth some matter showing title in himself (*o*),—and, upon the failure of the plaintiff, at the trial of a *quare impedit*, to make out his title, the defendant is put upon the proof of *his*,—that is, if he has so pleaded in his statement of defence.

If, upon the trial, the right be found for the plaintiff, then three further points are to be inquired into,—(1.) Whether the church be full or not,—and if it be, upon whose presentation it is full ; (2.) The yearly value of the church ; and (3.) Whether six calendar months have passed since the avoidance,—all which matters are material to be ascertained, in order to determine the nature of the damages to which the plaintiff is entitled (*p*). For, at common law, no damages were recoverable in a *quare impedit* ; but, by the statute of Westminster the Second (13 Edw. I.), c. 5, if more than six calendar months have passed by reason of the disturbance of any

(*m*) Stat. Westm. 2, c. 5 ; Roscoe on Real Actions, pp. 234, 240.

(*n*) *Colt v. Bishop of Coventry*, Hob. 193 ; *R. v. Bishop of Worcester*, Vaughan, 58.

(*o*) *Tufton v. Temple*, Vaugh.

78 ; *Carlisle v. Whaley*, 2 App. Cas. 391, 409.

(*p*) 2 Inst. 362 ; 6 Rep. 49 a ; *Poyner v. Chorleton*, Dy. 134 b ; 3 Bl. Com. 249.

person,—so that the bishop has presented by lapse, and the true patron has lost his presentation,—damages shall be adjudged against the disturber, to the amount of the value of the church for two years ; or if the six calendar months have not passed, then damages to the value of the moiety of the church for one year (*q*).

The judgment for the plaintiff in a *quare impedit* is, that he recover his presentation, and have a writ to the bishop, commanding him to admit his clerk (*r*) ; and also that he recover his damages and costs ; and such also (with the exception of the damages) is the judgment for the defendant, where he has made out his own title to present. Formerly, indeed, no costs were recoverable by either party in *quare impedit* ; but, by the 4 & 5 Will. IV. c. 39, where a verdict was given for the plaintiff, he was to have his costs in addition to his damages ; and where a verdict was given against him,—or he discontinued or was nonsuited,—he was to pay costs to the adverse party, subject only to this, that no judgment for costs was to be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the court or judge certified that he had probable cause for defending the action (*s*).

(II.) Secondly, Injuries to *personal* property, and being injuries either (1) to things in *possession* ; or (2) to things in *action*.

Firstly, Injuries affecting things in *possession*.—These are either (1) the deprivation (or amotion) of the possession, or (2) the abuse or damage of the chattel, while the possession continues in the legal owner ; and the injury of deprivation of possession may consist either in the taking

(*q*) 6 Rep. 51 a ; 2 Inst. 362 ;
Henslow v. Bishop of Sarum, Dy.
 76 b.

(*r*) F. N. B. 38 ; 3 Bl. Com. 250.
 (*s*) *Edwards v. Bishop of Exeter*,
 6 Bing. N. C. 146.

of the goods away unlawfully, or in their unlawful detention where the original taking was lawful, or in such other tortious acts as subject the owner to the loss of them, though the wrong-doer himself may be guilty neither of unlawful taking nor of unlawful detainer; and our present subject will therefore involve four several heads:—(1) the injury of unlawfully taking chattels from the owner; (2) that of unlawfully detaining them from him; (3) that of unlawfully depriving him of them, by means other than detention; and (4) that of doing damage to them while in his possession.

1. Of an unlawful *taking*.—The nature of this requires no illustration, and our attention, therefore, is to be chiefly directed to the remedy for it. One remedy is the restitution of the goods, together with damages for the loss sustained by their unjust invasion; and this is effected by the action of *replevin*,—an action which, however, is confined (in modern practice) to that species of unlawful taking which is called a wrongful distress (*t*). And in such a case, the action of replevin is always preceded by an application on the part of the owner, to the proper authority, to cause the goods taken to be *replevied*,—that is, re-delivered to the owner,—upon his giving such security as the law requires for trying the legality of the distress; and an application for this purpose is made to the registrar of the county court for the district within which the distress was taken (*u*). The registrar, on receiving this application, causes the goods to be replevied accordingly by an officer of the court, and to be delivered to the owner,—on his giving proper security to commence in the county court, within one month, an action of replevin against the distrainor, and to prosecute the

(*t*) Co. Litt. 145 b; Vin. Ab. (M. 6); *Mellor v. Leather*, 1 Ell. & Replevin (B.); Com. Dig. Action Bl. 619.

(*u*) 51 & 52 Vict. c. 43, s. 133.

action with effect and without delay, and to make return of the goods, if (in the result) a return of the same shall be adjudged (*x*); but the owner is also entitled (at his option) to give security to commence the action in the High Court instead of in the county court; and in the latter case, he must do so within one week (instead of one month),—and the security he gives will be to do so, and also to prosecute the action with effect and without delay, and to make return of the goods if a return shall be adjudged, and also (unless he shall obtain judgment by default) to prove that he had good ground for believing, either that the title to some corporeal or incorporeal hereditament (the rent or value whereof exceeded 20*l.* by the year) or to some toll, market, fair, or franchise, was in question, or that the rent or damage, in respect of which the distress was made, exceeded 20*l.* (*y*). In case the action is commenced in the county court, the defendant may have it *removed* into the High Court, by writ of *certiorari* (or by order in the nature of such writ),—and to obtain which writ (or order), the defendant applies to the High Court, giving security (to an amount not exceeding 150*l.*) to defend the action with effect, and (unless the plaintiff discontinues) to prove that he (the defendant) had good ground for believing to the effect already set forth in the case of an action by the replevisor (*z*).

The defence to the action of replevin may be, that the defendant never took the goods; but more often it admits the taking, and insists that the goods were lawfully taken, and claims a *return* of the goods; and such latter defence is called an *avowry*; or (if the distress was made not in the defendant's own right but as servant for another) it is called a *cognizance*. And in reply, the plaintiff may pay money into court, like in other actions,—but not so as to

(*x*) 51 & 52 Vict. c. 43, ss. 134,
136.

(*y*) Sect. 135.

(*z*) Sect. 137.

affect the security already given (*a*) ; or he may deny that any rent was due.

The judgment in replevin, when given in favour of the plaintiff, awards damages for the unlawful taking and detaining ; and when given for the defendant, awards either a return of the goods, or (if the distress was for rent) then (at the option of the defendant) a recovery of the amount of the rent in arrear,—and by the 17 Car. II. c. 7, if the plaintiff discontinue, the defendant may have a writ to inquire into the value of the distress by a jury, and may recover the amount of such value as damages, if less than the arrear of rent,—or if more, then so much as shall be equal to such arrear,—with costs ; and if the verdict be against the plaintiff, then the jury are to assess such arrears ; and if (in any of these cases) the distress be found insufficient, the defendant may take a further distress (or distresses).

[Another remedy for the unlawful taking of goods is the action of trespass *de bonis asportatis* ; but by this action, the plaintiff shall not recover the thing itself, but only damages for the loss of it ; and the plaintiff may (at his choice) have another remedy in damages, namely, the action of trover, of which more will be said presently.

2. Of an unlawful *detainer*.—There may be an unjust *detainer* of another's goods, where the original taking was lawful enough. As if I distrain another's cattle damage-feasant, and before they are impounded he tenders me sufficient amends,—my subsequent detention of them, after such tender, is wrongful, and he may have an action of *replevin* against me to recover them (*b*), together with damages for the *detention*. And if I lend a man a horse, and he afterwards refuses to restore it, I may

(*a*) 23 & 24 Vict. c. 126, s. 24.

(*b*) F. N. B. 89.

[recover possession by action of *detinue* (*c*), the judgment being conditional, that the plaintiff recover the chattel (or if it cannot be had, its value), and also certain damages for detaining the same ;] and on this judgment, the defendant had formerly the option to re-deliver the goods themselves, or else to render their value ; but, now, the plaintiff may have an order for the restitution of the specific goods, to be enforced by a special writ of execution, called a writ of delivery (*d*). And it being the object of *detinue* to obtain (if possible) specific restitution, the action will not lie for money, corn, or the like,—unless it be in a bag or a sack ; for then (and not otherwise) it may be distinguishably marked.

The action of *detinue* was formerly subject to the incident of *wager of law* (*radiatio legis*),—a proceeding which consisted in the defendant's discharging himself from the claim on his own oath, bringing with him at the same time into court eleven of his neighbours, to swear that they believed his denial to be true (*e*),—which relic of a very antient institution (*f*), even continued to subsist among us till abolished by the 3 & 4 Will. IV. c. 42, s. 13 (*g*) ; and inasmuch as *wager of law* exposed plaintiffs in *detinue* to great disadvantage, it had the effect of throwing that action almost entirely out of use, and of introducing in its stead the action of *trover and conversion*, which last mentioned action became therefore (and it still continues to be) the recognized and usual remedy for goods wrongfully *detained*.

The action of *trover* originally lay, only for the recovery

(*c*) F. N. B. 138; *Jones v. Dowle*, 9 Mee. & W. 19; *Williams v. Archer*, 5 C. B. 318; *Reeve v. Palmer*, 5 C. B. (N.S.) 84.

(*d*) *Chilton v. Carrington*, 15 C. B. 730; Ord. xlvi., rr. 1, 2.

(*e*) 3 Bl. Com. p. 341.

(*f*) *Ibid.* p. 343; Gr. Coutumier, ch. xxvi.

(*g*) *King v. Williams*, 2 Barn. & Cress. 538.

of damages against such person as had *found* another's goods and wrongfully *converted* them to his own use,—from which finding and converting it derived its name ; but the freedom of the action from wager of law, coupled with other technical considerations, gave it so considerable an advantage over the action of detinue, that it was at length permitted to be brought against anyone who had in his possession (by any means whatsoever) the personal goods of another, and refused to deliver them up when demanded,—the fiction of the *finding* of the goods not being material ; and under “The Common Law Procedure Act, 1852,” (15 & 16 Vict. c. 76), the allegation of the *finding* was omitted altogether from the declaration, that statute providing that the action might be sustained by showing, that the defendant wrongfully *converted* the goods to his own use, or wrongfully deprived the plaintiff of their use and possession (*h*) ; and it is, in fact, enough to prove, that the goods belonged to the plaintiff, and came to the defendant's possession, and that he refused (or neglected), upon request, to deliver them up,—a refusal on request being evidence of a conversion (*i*) ; and the right of action is not complete until there has been a demand followed by a refusal (*k*).

3. The injury of dispossessing another of his personal chattels may also be effected otherwise than by an unlawful taking or wrongful detainer ; *e.g.*, I may be deprived either of goods or of money from my having delivered over the goods, or lent the money, in consequence of a representation made by one person as to the circumstances or character of another,—which representation, if it was

(*h*) 15 & 16 Vict. c. 76, s. 49, sched. (B.) 28 ; *Munster v. The South Eastern Railway Company*, 4 C. B. (N.S.) 679.

(*i*) 10 Rep. 56 ; *Green v. Dunn*, 3 Camp. 215 (n.) ; *Rushworth v.*

Taylor, 8 Q. B. 699 ; *Heald v. Carey*, 11 C. B. 977 ; *Burroughs v. Bayne*, 5 H. & N. 296.

(*k*) *Spackman v. Foster*, 11 Q. B. D. 99.

untrue to the knowledge of the person by whom it was made, is an injury for which I may maintain an action against him (*l*); and the law is the same in the case of any other injury occasioned by the *fraudulent* misrepresentation of another (*m*). But such an action is essentially founded on the fraud or deceit of the party charged; and therefore it will not lie in any case where the representation, though untrue in fact, was made *bonâ fide* (*n*); and by Lord Tenterden's Act (9 Geo. IV. c. 14), s. 6, no action shall be brought to charge any one by reason of his representation concerning the character, ability, or dealings of another, with the intent that such other person may obtain credit, money, or goods,—unless such representation be made in *writing*, and signed by the party to be charged therewith (*o*). I may also be deprived of money to which I am entitled under the judgment of a court of law,—*e.g.*, by the wrongful omission of the sheriff to seize the goods of the defendant, under the writ of execution which I have sued out upon the judgment; and in such case, my remedy is against the sheriff (*p*),—subject, however, to the provisions of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29, and to the provisions of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

4. An owner of personal property may also be injured by its *abuse or damage*; and of this injury, hunting his

(*l*) *Foster v. Charles*, 6 Bing. 396; 7 Bing. 105; *Polhill v. Walter*, 3 B. & Ad. 114.

(*m*) *Pewtriss v. Austen*, 6 Taunt. 522; *Taylor v. Ashton*, 11 Mee. & W. 401; *Behn v. Kemble*, 7 C. B. (N.S.) 260; *Mullett v. Mason*, Law Rep. 1 C. P. 559; *Ward v. Hobbs*, *ib.* 3 Q. B. 150.

(*n*) *Haycraft v. Creasy*, 2 East, 92; *Smout v. Ilbery*, 10 Mee. & W. 1; *Ormrod v. Huth*, 14 Mee. & W.

651; *Collins v. Evans* (in error), 5 Q. B. 820.

(*o*) *Haslock v. Fergusson*, 7 Ad. & El. 86; *Swan v. Phillips*, 8 Ad. & El. 457; *Pilmore v. Hood*, 5 Bing. N. C. 97; *Devaux v. Steinkeller*, 6 Bing. N. C. 84; *Tatton v. Wade*, 18 C. B. 371; *Swift v. Jewsbury*, Law Rep., 9 Q. B. 301.

(*p*) *Williams v. Mostyn*, 4 Mee. & W. 145; *Guest v. Elwes*, 5 Ad. & El. 118.

deer, shooting his dogs, or poisoning his cattle, may be mentioned as examples ; and taking from the value of his chattels in anywise, or making them in a worse condition than before, by any negligent or wilful mischief, will also amount to this injury. Moreover, personal property being, sometimes, of an intangible or incorporeal nature,—as in the case of a copyright or patent right,—the piracy of a literary composition, or the infringement of a patent, will be an injury falling under this head of injuries ; and of a similar description is the injury committed by one manufacturer who sells his goods under the *trade mark* of another (*q*), and whether he should or should not have registered his trade mark. And for an infringement of such rights as these, the plaintiff may by his action recover not only damages for the injury already suffered, but may also obtain an *injunction* restraining the wrongdoer from the further invasion of the right ; and in lieu of damages, he may (at his option) have an account of the profits derived from the wrongful sale, and obtain payment of the amount appearing due on such account (*r*).

Secondly, Injuries affecting things in *action*,—in other words, injuries affecting such rights as are founded in and arise from *contracts*. It will be remembered, that contracts may be either under seal or by parol,—verbal or written,—express or implied ; and for the *breach of contract* of whatever kind it be, an action will lie (*s*). It is expedient, therefore, now to advert shortly to some particular contracts of common occurrence, and to state the remedies for their breach :—

1. As regards the breach of *covenants in leases*, the

(*q*) *Sykes v. Sykes*, 3 Barn. & Cress. 541 ; *Burgess v. Hills*, 26 Beav. 244 ; *Leather Cloth Company v. American Leather Cloth Company*, 11 H. of L. Ca. 523.

353 ; *Badische v. Levinstein*, 24 Ch. Div. 156 ; *Chatterton v. Cave*, 3 App. Ca. 483.

(*s*) *Vide sup.* vol. II. pp. 54—142.

(*r*) *Fox v. Hill*, 2 De Gex & J.

remedy for either party is by action on the covenant; but in the case of a covenant to *pay rent*, the breach of it may be redressed either by action on the covenant or by action of debt; and although for a freehold rent, viz., a rent issuing out of a freehold estate, whether of inheritance or for life, no action of debt lay (by the common law) *during the continuance of the freehold out of which it issued* (t), yet, by the 8 Anne, c. 18 and 5 Geo. III. c. 17, such action may now be brought to recover freehold rents, if reserved on a lease for life only (u); and since the abolition of real actions by the 3 & 4 Will. IV. c. 27, debt will also now lie for the recovery of a rent of inheritance,—and presumably, therefore, also for arrears of a rent-charge or annuity, granted in fee, or in tail, or for life (x),—and, *semble*, although the arrears claimed to be recovered in the action exceed the whole profits accruing from the lands charged therewith (y).

2. Under a contract of *sale* of goods, the buyer may recover damages for the non-delivery, the measure of the damages being the estimated loss directly and naturally resulting from the breach of contract (z),—which estimated loss will (when there is a market for the goods) be *primâ facie* the difference between the contract price and the market price. And the buyer may also recover damages for breach of warranty, the measure of damages being again the estimated loss,—which estimated loss is *primâ facie* the difference between the value of the goods at the time of the delivery and the value they would then have had if they had answered to the warranty (a). Also, if the action be brought for breach of contract to deliver specific

(t) 3 Bl. Com. 232.

(u) *Ibid.*

(x) Bac. Abr. (Annuity and Rentcharge); *Thomas v. Sylvester*, Law Rep., 8 Q. B. 268; *Searle v. Cooke*, 43 Ch. D. 519.

(y) *Pertwee v. Townsend*, [1896]

2 Q. B. 129.

(z) 56 & 57 Vict. c. 71, s. 51.

(a) *Ibid.* s. 53.

goods, then, by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52, repealing (but re-enacting with simplifications and amendments) the like provisions contained in the 19 & 20 Vict. c. 97, ss. 1, 2, the court may, upon the application of the plaintiff, give judgment for the specific performance of the contract, that is, for the delivery of the specific goods,—without giving the defendant the option of retaining them on payment of the damages for their non-delivery; and upon such a judgment, execution may afterwards issue for the delivery of the specific goods sold; and, in default of delivery, the sheriff shall distrain the defendant by all his lands and chattels, until he deliver the goods,—a species of relief which is now obtainable under the writ of delivery provided by the Judicature Acts (b).

2A. And under a contract of sale, if it is the buyer who breaks the contract of sale, the seller may have his action against him for the price of the goods sold (c); or he may recover damages against the buyer for his refusal to accept the goods sold, the measure of the damages in such case being the estimated loss,—which loss (when there is a market for the goods) will be *primâ facie* the difference between the contract price and the market price at the time when the goods ought to have been accepted (d).

3. With regard to the contract for the *loan of money*, and other analogous pecuniary claims, such as for *money paid* by the plaintiff for the defendant at his request, and for money *received* by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff, upon an *account stated* between them,—it is often difficult (and usually unimportant) to determine, upon a given state of facts, into which of these claims the plaintiff's case properly resolves itself, the remedy being

(b) Ord. xlvi. (1883), rr. 1, 2;
App. H., No. 10.

(c) 56 & 57 Vict. c. 71, s. 49.
(d) *Ibid.* s. 50.

(practically) the same for the breach of any of these contracts.

4. As regards the contract of *partnership*, questions of account between partners are, in general, settled in the Chancery Division, and (except by “action of account,” which in modern times has rarely come into use) are not proper for the Queen’s Bench Division. But an action may be brought, in either Division, by one partner against the other, on an express agreement to do or forbear from some particular act not involving a question of account (*e*); or on an account stated, or agreement to pay a liquidated balance, or the like (*f*); and though one partner cannot bring a legal action against his co-partner for appropriating to his own exclusive use a chattel of the partnership, yet if one of the partners has *destroyed* such a chattel, the other may maintain an action in respect thereof (*g*).

5. As to the contract of *guarantee*, the remedy by the surety against the principal debtor, where the former has been compelled to make a payment under the guarantee, is for money paid by the former to the use of the latter; and any one of several co-sureties, who has paid more than his rateable proportion, is entitled to claim contribution from the other or others.

6. Upon *bonds*, the remedy of the obligee, in case of breach of contract by the obligor, is by action for the amount of the penalty; but the plaintiff is allowed to recover no more,—upon a bond conditioned for the payment of money, than the principal sum (with interest and costs) in respect of which it was given; nor upon a bond

(*e*) *Bedford v. Button*, 1 Bing. N. C. 391.

(*f*) *Chit. Cont.* 238; *Smith v. Barrow*, 2 T. R. 476.

(*g*) *Co. Litt.* 200 a, b; *Bull. N. P.* 34; *Martyn v. Knowllys*,

8 T. R. 145.

conditioned for the performance of any other act, more (in general) than shall be assessed by way of damages.

7. As regards obligations to pay money, arising where a judgment obtained by one man against another, or arising upon a penal Act of Parliament, and made recoverable either by the Crown, or by the party aggrieved, or by a common informer, there is (in effect) a contract to pay, for the breach of which either the judgment creditor or (as the case may be) the Crown, the party aggrieved, or the common informer, has a right of action on the judgment, or on the penal statute, respectively ; and in the latter case, the remedy is commonly called a penal action,—or (where one part of the forfeiture is given to the Crown, and the other part to the informer) a *popular* or *qui tam* action, because it is brought by a person *qui tam pro domino rege quam pro se ipso sequitur* (*h*) ; but in the case of a penal action, the plaintiff is sometimes required to have first obtained the *fiat* of the Attorney-General (*i*).

Thirdly, INJURIES AFFECTING RIGHTS IN PRIVATE RELATIONS.

This class of injuries may be considered as comprising such as may be done to persons under the four following relations,—husband and wife ; parent and child ; guardian and ward ; and master and servant.

I. [The injuries that may be offered to a man, considered as a *husband*, are principally three, namely :—*abduction* (or taking away his wife) ; *adultery* (or criminal conversation with her) ; and *beating* or otherwise abusing her.

And, first, *abduction*,—which may be either by fraud and persuasion, or by open violence,—though the law in both cases supposes force and constraint, the wife having no power to consent ; and therefore gives a remedy by action

(*h*) *Bradlaugh v. Clarke*, 8 App. Ch. 354. (*i*) 47 & 48 Vict. c. 74, s. 2.

[*de uxore raptâ et abductâ* (*k*).] This action lay at the common law ; and in this action the husband recovered, not the possession of his wife, but damages for taking her away (*l*) ; and by the statute of Westminster the First (3 Edw. I.), c. 13, the offender might also have been imprisoned for two years, and fined at the pleasure of the Crown,—so that, by the old law, both the Crown and the husband might have this action (*m*). A husband is, also, entitled to recover damages against any who persuade and entice his wife to live separate from him without a sufficient cause (*n*) ; and the old law was very strict in this particular,—so much so, that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted, and in danger of being lost or drowned ; but he might carry her behind him on horseback,—to market ; or to a justice of the peace, for a warrant against her husband ; or to the spiritual court, to sue for a divorce (*o*).

Secondly, *adultery* is not punishable by our law as a crime, its penal correction being left to the spiritual courts, which may proceed against the offender *pro salute animæ* (*p*) ; but considering it as a civil injury, the law (as it stood up to a recent period) gave satisfaction for it to the husband, by an action for *criminal conversation* ; and in that action, the damages recovered were usually increased or diminished by the circumstances of each particular case (*q*),—the rank and fortune of the plaintiff and defendant, the relation or connection between them, the degree and nature of the seduction, the previous behaviour and character of the wife, the manner in which

(*k*) F. N. B. 89.

(*l*) 2 Inst. 434.

(*m*) 3 Bl. Com. p. 139 ; Inst.
ubi sup.

(*n*) B. N. P. 78.

(*o*) Bro. Ab. tit. Trespass, 207,
213, 440.

(*p*) *Vide sup.* p. 348, n.

(*q*) B. N. P. 26.

she had been previously treated by the husband, the husband's obligation (by settlement or otherwise) to provide for children probably spurious, being all taken into consideration (*r*); and the damages would be mitigated, where the husband was proved to have been himself first guilty of conjugal infidelity (*s*); also, if it appeared that he connived at or consented to his own dishonour (*t*), or lived (at the time of the adultery) in a state of absolute and permanent separation from his wife,—the action would be wholly barred (*u*); and this action could not be maintained, without proving a marriage in fact,—though, in other cases, reputation and cohabitation are, as the general rule, sufficient evidence of marriage (*x*). But the action for criminal conversation is now altogether abolished, and its place is supplied by a different form of proceeding (*y*),—it having been provided, by the 20 & 21 Vict. c. 85, s. 33, that a husband may (by petition, to the Court of Divorce established by that statute, and which is now called the Divorce Division of the High Court), claim *damages* from any person, on the ground of his having committed adultery with the wife of the petitioner (*z*),—which petition is served on the alleged adulterer and the wife; and the claim for damages is heard and tried on the same principles and according to the same rules as formerly applied to an action for criminal conversation. But the Act has also introduced the new principle, of giving power to the court to direct, after the verdict has been given, in what manner the damages shall be paid or applied; and, in particular, to direct that the whole or a part thereof shall be settled for the benefit of the children, (if any,) of the marriage, or as a provision for the

(*r*) 3 Bl. Com. 139.

(*s*) *Bromley v. Wallace*, 4 Esp. 237.

(*t*) *Bennett v. Allcott*, 2 T. R. 166.

(*u*) *Weedon v. Timbrell*, 5 T. R. 357.

(*x*) *Morris v. Miller*, Burr. 2057.

(*y*) 20 & 21 Vict. c. 85, s. 59.

(*z*) 36 & 37 Vict. c. 66, s. 34.

maintenance of the wife (*a*) ; and this jurisdiction may be exercised in favour of the innocent party, although there are no children of the marriage (*b*) ; and the court may even allow alimony, upon special grounds, to the guilty wife (*c*).

For the injury of *beating* a man's wife, or otherwise ill-using her, the law distinguishes:—for, firstly, if it be a common assault, battery, or imprisonment, the law gives a remedy to recover damages in an action brought in the names of the husband and wife *jointly* ; but, secondly, if the beating or other maltreatment be very enormous (*per quod consortium amisit*), the law then gives the husband a *separate* remedy for this ill-usage,—in which he must prove (by way of *special* damage), that he has thus lost the benefit of his wife's society (*d*) ; and the two claims may now be joined in one and the same action (*e*).

II. With respect to the relation of *parent* and child, it seems to be now clearly established, that there is no instance in which an injury can be sustained by a parent *in his merely parental character* ; and that in the case of a battery or other ill-treatment inflicted on his child, the action for redress must be brought in the name of the child (*f*).

III. [An injury may be done to a man as a *guardian*, by stealing or ravishing away his ward,—for though guardianship in chivalry is now totally abolished, and that was the only kind of guardianship beneficial to the

(*a*) *Keats v. Montezuma*, 1 Swab. & Trist. 334 ; *Pounsford v. Bulpin*, 2 Swab. & Trist, 389 ; *Bent v. Footman*, *ib.* 392.

(*b*) 41 Vict. c. 19 ; *Yglesias v. Yglesias*, 4 P. D. 71.

(*c*) Browne's Divorce Pract., 2nd ed. p. 144.

(*d*) *Guy v. Livesay*, Cro. Jac. 501 ; *Hide v. Scyssor*, *ib.* 538

(*e*) 15 & 16 Vict. c. 76, s. 40 ; Order xviii. (1883), rr. 1, 3—5.

(*f*) *Hall v. Hollander*, 4 Barn. & Cress. 660.

[guardian, yet the guardian in socage was always (and is still) entitled to an action of ravishment, if his ward be taken from him (*g*); but he accounts to the ward for the damages which he so recovers (*h*); and by the 12 Car. 2, c. 24, the testamentary guardian also has this remedy, subject to the like liability to account to his ward (*i*).] But a more speedy and summary method of redressing all complaints, relative to wards and guardians, is now obtained in the Chancery Division of the High Court, which has the superintendent jurisdiction of all the infants in the kingdom (*k*).

IV. [To the relation of *master and servant*, there are several species of injuries incident. For example, retaining a man's hired servant before his time is expired, is an injury to the master,—for every master has, by the contract of service, purchased for a valuable consideration the services of his domestics for a limited time: and for this injury, the law has given the master a remedy in damages against the wrongdoer (*l*); and the law gives the master the like remedy for enticing away the servant (*m*),—*scil.*, for the breach of contract thereby committed by the servant; but, *semble*, merely to prevent a man from engaging a servant is not a wrong for which any action will lie (*n*). The master may, of course, have an action against the servant, for non-performance of his agreement (*o*),—although not against the new master if he was not apprised of the former contract,—unless, indeed, he refuses to restore the servant upon demand (*p*).

(*g*) F. N. B. 139.

(*h*) Hale on F. N. B. 139.

(*i*) *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 108.

(*k*) 36 & 37 Vict. c. 66, ss. 16, 34.

(*l*) *Evans v. Walton*, Law Rep. 2 C. P. 615.

(*m*) *Lumley v. Gye*, 2 Ell. &

Bl. 216; *Bowen v. Hall*, 6 Q. B. D. 333.

(*n*) *Allenv. Flood*, [1898], A. C. 1.

(*o*) F. N. B. 167; *Keane v. Boycott*, 2 H. Bl. 511; *Gunter v. Astor*, 4 Moore, 12.

(*p*) F. N. B. 167; *Winch*, 51.

[Another injury to this relation, is beating, confining, or disabling the servant, so that he is not able to perform his work,—which injury depends upon the same principle as the last, viz., the property which the master has, by the contract of service, acquired in the labour of the servant;] and in this case, besides the action which the servant himself may have against the aggressor, the master also, as a recompense for *his* immediate loss, may maintain an action (*q*),—[in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit* (*r*).] And it is in this manner alone, that, by our law, a parent is enabled to claim redress for a battery (or other ill-usage) inflicted on his child; or even for the seduction of his daughter,—that is to say, the parent must, in either case, sue as the master of his child, the child being (for this purpose) regarded as his servant; and, therefore, unless a parent is able to prove, that his child was in his service at the time the injury was committed, he is without remedy (*s*); from which it follows, that he is without remedy when the child resided, at the time, with another master,—though that master may on his part maintain the action (*t*). But where a parent is plaintiff in a case of seduction, the courts incline to relieve him (as much as possible) from any difficulty connected with proof of the loss of service,—considering the action as brought *in substance* to repair the outrage done to the parental feelings,—and it has been held, therefore, that the mere residence of the child with him at the time, affords sufficient proof that the relation of master and servant existed between them (*u*); and the

(*q*) *Chamberlain v. Hazlewood*, 5 Mee. & W. 515.

(*r*) 9 Rep. 113; 10 Rep. 130.

(*s*) *Hall v. Hollander*, 4 Barn. & Cress, 660; *Manley v. Field*, 7 C. B. (N.S.) 96; *Evans v. Walton*,

Law Rep. 2 C. P. 615; *Hedges v. Tagg*, *ib.* 7 Exch. 283.

(*t*) *Thompson v. Ross*, 5 H. & N. 16.

(*u*) *Jones v. Brown*, 1 Esp. 217; *Torrence v. Gibbens*, 5 Q. B. 297;

jury, in assessing the damages, will take into account the dishonour done to the plaintiff, in addition to the loss of service (*x*). No action for seduction can, of course, be maintained by the daughter herself—for *volenti non fit injuria*; and the action will not lie against the master himself for the seduction by him (*y*); nor, *semble*, will the seducer be liable to either master, where the act of seduction falls in the period of the girl's service with one of them, and the illness falls in the period of service with the other of them (*z*).

Fourthly, INJURIES AFFECTING PUBLIC RIGHTS.

The only injuries which now remain to be noticed are those sustained by a man in respect of his *public* rights; but injuries of this description are, in general, of such a nature as to be remediable, not so much by action, as by indictment or information,—or by some of those prerogative writs, to which we shall have occasion to advert hereafter. Yet where *special damage* is sustained by an individual, in consequence of the obstruction of a highway (*a*); or where the returning officer at a parliamentary election refuses to receive the vote of an individual, so that the election takes place without his being allowed to exercise his elective right (*b*),—in either of these cases, there is a right of action, in which damages are recoverable. Also, by the 31 & 32 Vict. c. 125 (commonly called the Parliamentary Elections Act, 1868), s. 48, “if any “returning officer wilfully delays, neglects, or refuses, “duly to return any person who ought to be returned to

Rist v. Faux, 4 B. & Smith, 409;
Terry v. Hutchinson, Law Rep.
 3 Q. B. 599.

(*x*) Stark. Ev. part iv. p. 1309.

(*y*) *Speight v. Oliveira*, 2 Sta.
 493.

(*z*) *Daries v. Williams*, 10 Q. B.
 725.

(*a*) *Wilkes v. Hungerford Market*,
 2 Bing. N. C. 281.

(*b*) *Ashby v. White*, Ld. Raym.
 938; *Pryce v. Belcher*, 3 C. B. 58;
 4 C. B. 866.

“serve in parliament for any county or borough, such person may,—in case it has been determined on the hearing of an election petition under the Act that such person was entitled to have been returned,—sue the officer, . . . and shall recover double the damages he has sustained by reason thereof, together with full costs of suit ; provided such action be commenced within one year after the commission of the act on which it is grounded, or within six months after the conclusion of the trial relating to such election.” But regarding this action, and generally regarding all actions brought against public officers, in respect of any alleged breach or failure of duty on their parts, it has now been provided, by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), that the action shall be commenced within six months ; and (if the action be for damages), then tender of amends before action, or tender or payment into court after action, —or any undue haste in the plaintiff in commencing his action whereby tender of amends before action was prevented,—will in general have this effect, namely, that if the plaintiff lose the action, he will have to pay the defendant’s costs between solicitor and client ; and if he succeed in the action, he will, in general, obtain only his costs up to the date of payment into court, paying in that case the defendant’s subsequent costs as between solicitor and client (c).

(c) *Fielding v. Morley Corporation*, [1899] 1 Ch. 1.

CHAPTER VIII.

OF EQUITY IN ITS RELATION TO LAW.

It has been already stated, that equity has, from an early time, constituted a large and important portion of our juridical system—distinct from and suppletory of the common law, and which for a long period of our history, and indeed until quite recently, was administered in its own peculiar courts. [The terms, a court of *equity* and a court of *law*, suggest, indeed, a contrast with each other; but it is not therefore to be presumed that the one judged without equity, or that the other was not bound by the law;] and in fact [every definition or illustration to be met with, which would draw a line between the two jurisdictions, by setting law and equity in opposition to each other,—will be found either totally or in great part erroneous.

1. Thus, in the first place, it is said, that it is the business of equity to abate the rigour of the common law (*a*),—and that, undoubtedly, is one of the purposes of equity; but there must first be laid some ground for the abatement; and otherwise, the rigour of the law is not abated by equity. For example, in the case of bond creditors, whose debtor devised away his real estates, and so defeated them of their debts, equity did not interpose: also, land descended or devised was not liable for the simple contract debt of the deceased,—even though such debt might have been (in fact) the very purchase money

(*a*) 3 Bl. Com. p. 430; Lord Kaimes, Prin. of Eq. 44.

[payable for the land ; a father could not succeed to the real estate of his son, and lands would descend to a remote relation of the whole blood—or even escheat to the lord—but would not (by descent) go to the half-blood, although a brother even,—for in none of these cases would equity have interfered, in general (*b*),—that is to say, unless there was some circumstance added, which equity would regard as a ground for its interposition.

2. Again, it is said, that equity determines according to the spirit of the rule, and not according to the strictness of the letter (*c*) ; but so also does the law,—both being equally bound, and equally professing, to interpret statutes according to the true intent of the legislature. All cases cannot be foreseen ; and some cases therefore there must always be, which will fall within the meaning, though not within the words of the legislature, and *vice versâ* ; and with reference to these, they are sometimes said to fall within, or to be *out* of, the *equity* of the Act of Parliament,—meaning, by equity as thus used, nothing but the sound interpretation of the law ; and these are the cases which, as Grotius says, “*lex non exactè definit, sed arbitrio boni viri permittit*,”—in order to find out the true sense and meaning of the lawgiver from every other canon of construction (*d*) ; but there is not a single rule of interpreting a statute that is not equally used both at law and in equity ; the construction must in both be the same,—each endeavouring to fix and adopt the true sense of the enactment in question, and neither being able to enlarge, diminish, or alter that sense, in a single tittle.

3. But it hath been said, that *fraud*, and *accident*, and *trust*, are the proper and peculiar objects of equity (*e*) ;

(*b*) Ff. 40, 9, 12.

(*d*) De Æquit. s. 3.

(*c*) Lord Kaims, Prin. of Eq.
177.

(*e*) 1 Roll. Abr. 374 ; 4 Inst. 84 ;
Earl of Bath v. Sherwin, 10 Mod. 1.

[and yet every kind of *fraud* is equally cognizable (and equally adverted to) at law, and many *accidents* are also relieved against at law,—as loss of deeds, mistakes in receipts or accounts, wrong payments, deaths (which make it impossible to perform conditions literally), and a multitude of other contingencies. Also, some frauds or accidents cannot be relieved, even in equity; as, for example, the accident of a devise ill executed; and as regards trusts, although *technical trusts* (*scil.*, of lands) are peculiarly appropriate to equity, yet there are trusts which are (and always were) cognizable at law,—*e.g.*, deposits, and all manner of bailments; also, that implied contract (so highly beneficial and useful) of having undertaken to account for money received to another's use.

4. Again, it hath sometimes been said, that equity is not bound by precedents, but acts upon the opinion of the judge, founded on the circumstances of every particular case (*f*); but in truth, our system of equity is a laboured connected system, and is bound down by precedents, from which it does not depart (*g*).

These inexact (and more or less erroneous) views of equity (*h*) were perhaps excusable in the infancy of our courts of equity, before their jurisdiction was fully settled,—the decrees of courts of equity in early times having been, possibly, in the nature of awards, formed *pro re natâ*, with more probity of intention than regard for technicality; but the systems of jurisprudence, both at law and in equity, are now equally positive systems;] and the two systems are also now in strict accordance with each other. *Equity*

(*f*) Selden (Table Talk, tit. Equity) says (rather foolishly):—"For *law* we have a measure, and know what to trust to; *equity* is according to the conscience of him that is chancellor; and is according to the measure of the chancel-

lor's foot. What an uncertain measure!"

(*g*) *Foster v. Munt*, 1 Vern. 473.

(*h*) Archeion. 71, 72, 73; De Augm. Scient. l. 8, ch. 3; Table Talk, tit. Equity; Gloss. 108.

follows the law ; and although some instances to the apparent contrary have always existed,—as in the case of money-bonds (with a penalty), and as in the case of mortgages,—still when the respective legal and equitable effects of each particular transaction are properly distinguished, the divergence is not a conflict. Usually, also, the apparent conflict is set at rest by statute,—*e.g.*, in the case of money-bonds, by the 37 Hen. VIII. c. 9 and 4 & 5 Anne, c. 3, and in the case of mortgages, by the 7 Geo. II. c. 20 (*i*). But neither equity nor law can vary men's agreements, or make wills for them (by any alteration in the effect of the wills which they have made) ; and equity no more than law, can relieve against, modify, or control, any lawful stipulation ; and in matters of *positive* right, both law and equity submit to and recognize the right, with all its consequences. Therefore both follow, *e.g.*, the law of nations,—collecting it from history and from the most approved authors,—where the question depends upon that law,—as in the case of the privileges of ambassadors ; and in mercantile transactions, both follow the maritime law, as that law has been established by the usages of all maritime countries ; and in matters originally of ecclesiastical cognizance, both equally adopt the canon or imperial law, according to the nature of the subject ; and when a question, which is properly determinable according to some foreign municipal law, comes into the court for decision, the court (whether of law or equity) receives information as to what is the law of the country, and decides by that law accordingly (*k*).

It must, however, be admitted that equity and law, as administered previously to the recent changes, were not, in the exercise of their concurrent jurisdiction, consistent

(*i*) *Stern v. Vanburgh*, 2 Keb. 553, 555 ; *Elliott v. Callow*, Salk. 597. (*k*) Phil. on Ev. vol. ii. p. 144.

in some things,—so that the abuse occasionally arose, that a different rule obtained, according as the remedy of the suitor was at law or in equity : and the framers of the Judicature Acts, therefore, seized the occasion of the union of the several courts, whose jurisdiction was thereby transferred to the High Court of Justice, to amend and declare the law to be administered in England, as to certain matters respecting which such discrepancy existed ; and accordingly these Acts have declared (among other changes of minor importance), that for the future :—(1.) An estate for life without impeachment of waste shall not be deemed to have conferred upon a tenant for life any *legal* right to commit waste of the description known as equitable waste,—unless an intention to confer such right shall expressly appear by the instrument creating such estate. (2.) There shall not be any merger, by operation *of law* only, of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity. (3.) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which the mortgagee shall have given no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, *in his own name* only,—unless the cause of action arises upon a lease or other contract made by him jointly with some other person. (4.) Any absolute assignment by writing under the hand of an assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom such assignor would have been entitled to receive or claim such debt or chose in action—shall be effectual in law (subject to all equities which would have been entitled to priority over

the right of the assignee if those Acts had not passed) to transfer the *legal* right thereto from the date of such notice, together with all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor,—subject, nevertheless, to this proviso, that if the debtor, trustee, or other person liable in respect of such debt or chose in action, shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claim to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same; or he may, if he think fit, pay the same into the High Court of Justice, under the Trustee Act, 1893. (5.) Any stipulations in a contract which, before the Acts, would not have been deemed in a court of equity to be (or to have become) of the essence of such contract, shall receive in all courts the same construction and effect as they would have theretofore received *in equity*. (6.) An injunction may be granted, whether the estates claimed by both or by either of the parties are *legal* or are *equitable*. (7.) In questions relating to the custody and education of infants, the rules of *equity* shall prevail over those formerly laid down by the courts of *law*. And (8.) Generally, in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of *equity* shall prevail (*l*),—and (as regards the mere *procedure*), the rules of law or of equity shall prevail, whichever is the more convenient of the two (*m*).

(*l*) 36 & 37 Vict. c. 66, s. 25.

(*m*) Ord. (1883) lxxii. r. 2; *New-*

biggin v. Armstrong, 13 Ch. D.

310; *Le Grange v. McAndrew*,

4 Q. B. D. 211.

Such, then, being the parity of law and reason which governs both systems, wherein (it may be asked) does their essential difference consist? And to this, the answer is, that the difference principally consists,—in the subjects over which they exercise jurisdiction; in the kind of relief they administer; and in the modes of proceeding they pursue respectively (*n*).

Firstly, as to the Subjects of Jurisdiction.—The jurisdiction in equity having been originally introduced to mitigate certain severities and to supply certain defects existing in the common law, and from which relief could not otherwise be obtained, such jurisdiction is consequently to be considered as in the nature of a supplement only to the proper and antient scheme of judicature; and some general idea of the nature of equitable business, falling within such supplementary jurisdiction, may be gained from that provision of the Judicature Acts which specifically assigns to the Chancery Division of the High Court of Justice the following causes and matters:—1. The administration of the estates of deceased persons; 2. The dissolution of partnerships, or the taking of partnership or other accounts; 3. The redemption or foreclosure of mortgages; 4. The raising of portions, or other charges on land; 5. The sale and distribution of the proceeds of property subject to any lien or charge; 6. The execution of trusts, charitable or private; 7. The rectification, or setting aside, or cancellation of deeds or other written instruments; 8. The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases; 9. The partition or sale of real estates; and 10. The wardship of infants and the care of infants' estates (*o*).

(*n*) *Wykham v. Wykham*, 18 Ves. 415; *Clarke v. Parker*, 19 Ves. 21, 22. (*o*) 36 & 37 Vict. c. 66, s. 34.

But the above subjects do not include the whole of the jurisdictions which it was proposed to transfer to the High Court of Justice from the Court of Chancery ; and therefore the Judicature Acts proceed further to assign to the High Court (Chancery Division) “all causes and matters,” taken under any Act of Parliament whereby *exclusive* jurisdiction in respect thereof has been given to the Court of Chancery or to any judge or judges thereof. Consequently, the jurisdiction of the Chancery Division of the High Court of Justice naturally divides itself into two parts :—The first consisting of that which it derives from the transfer to it of the several specific matters above enumerated,—all of which arose out of the gradual growth of the equitable jurisdiction ; and the other consisting of (or comprising) the jurisdiction which it derives from the divers miscellaneous enactments, which have, in divers causes and matters, conferred exclusive jurisdiction on the former Court of Chancery (*p*).

(*p*) See (among other statutes) and 61 & 62 Vict. c. 26). *The Burial Acts* (15 & 16 Vict. c. 85 ; 16 & 17 Vict. c. 134 ; 17 & 18 Vict. c. 87 ; 18 & 19 Vict. c. 128 ; 20 & 21 Vict. c. 81 ; 22 Vict. c. 1 ; 23 & 24 Vict. c. 64 ; 25 & 26 Vict. c. 100. 34 & 35 Vict. c. 33). *Cestui que vie, production of* (6 Ann. c. 72, otherwise c. 18). *Charitable Trusts Acts* (16 & 17 Vict. c. 137 ; 18 & 19 Vict. c. 124 ; 32 & 33 Vict. c. 110). *Charitable Uses Acts* (51 & 52 Vict. c. 42 ; 54 & 55 Vict. c. 73). *Charitable Trustees Incorporation Act*, 1872 (35 & 36 Vict. c. 24). *Church Building Amendment Act* (8 & 9 Vict. c. 70). *The Companies Acts*, 1862 to 1898 (25 & 26 Vict. c. 89 ; 30 & 31 Vict. c. 131 ; 33 & 34 Vict. c. 104 ; 40 & 41 Vict. c. 26 ; 42 & 43 Vict. c. 76 ; 43 & 44 Vict. c. 19 ; 53 & 54 Vict. cc. 62, 63, 64 ;

and 61 & 62 Vict. c. 26). *The Copyhold Acts* (4 & 5 Vict. c. 35 ; 1 & 16 Vict. c. 51 ; 21 & 22 Vict. c. 94 ; 50 & 51 Vict. c. 73 ; and now 57 & 58 Vict. c. 46). *The Conveyancing Acts*, 1881, 1882, and 1892 (44 & 45 Vict. c. 41 ; 45 & 46 Vict. c. 39 ; 55 & 56 Vict. c. 13). *The Custody of Infants* (36 & 37 Vict. c. 12 ; 49 & 50 Vict. c. 27 ; 54 Vict. c. 3). *Defence Acts* (5 & 6 Vict. c. 94 ; 18 & 19 Vict. c. 117 ; 22 & 23 Vict. c. 21 ; 23 & 24 Vict. c. 112 ; 27 & 28 Vict. c. 89). *Debts and Liabilities*, Sir George Turner’s Act (13 & 14 Vict. c. 35 ; 23 & 24 Vict. c. 38). *Ecclesiastical Estates Acts* (5 & 6 Vict. c. 26 ; 14 & 15 Vict. c. 104). *Fines and Recoveries, Abolition of* (3 & 4 Will. 4, c. 74). *Grammar*

Secondly, as to the Relief administered in the Chancery Division.—And here we can but refer, in the most general way, to the relief given to lessees in the case of leases under powers defectively executed (*q*) ; and to the relief given to purchasers and creditors, and to wives, children, and charities, in the case of powers of appointment defectively executed (*r*) ; and to the relief (by way of rectification) given in the case of mistakes in settlements and the like, including even disentailing deeds (*s*).

Schools (3 & 4 Vict. c. 77). *Inclosure Act*, 1845 (8 & 9 Vict. c. 118). *Judgments, Sale of Lands under* (27 & 28 Vict. c. 112). *Land, Improvement of* (27 & 28 Vict. c. 114 ; 45 & 46 Vict. c. 38). *Lands Clauses Consolidation*, 1845 (8 & 9 Vict. c. 18). *Legacy Duty* (36 Geo. 3, c. 52 ; and now 56 & 57 Vict. c. 53). *Merchant Shipping* (57 & 58 Vict. c. 60). *Mortgage Debentures* (28 & 29 Vict. c. 78 ; 33 & 34 Vict. c. 20). *Married Women's Property* (33 & 34 Vict. c. 93 ; 45 & 46 Vict. c. 75 ; 56 & 57 Vict. c. 63). *Metropolitan Board of Works (Loans) Act* (32 & 33 Vict. c. 102, s. 40 ; 51 & 52 Vict. c. 41). *Municipal Corporations* (45 & 46 Vict. c. 50). *National Debt Acts*, 1870 and 1884 (33 & 34 Vict. c. 71, and 47 & 48 Vict. c. 23) ; and *Redemption and Conversion Acts* (51 & 52 Vict. cc. 2, 15 ; and 52 & 53 Vict. cc. 4, 6). *Parliamentary Deposits Act* (9 & 10 Vict. c. 20). *Petition of Right Act* (23 & 24 Vict. c. 34). *Partition Acts* (31 & 32 Vict. c. 40 ; 39 & 40 Vict. c. 17). *Patents, Designs, &c.* (46 & 47 Vict. c. 57 ; 48 & 49 Vict. c. 63 ; and 51 & 52 Vict. c. 50). *Settled Estates* (40 & 41 Vict. c. 18). *Settled Land*

(45 & 46 Vict. c. 38 ; 47 & 48 Vict. c. 18 ; 53 & 54 Vict. c. 69). *Land Tax Redemption* (42 Geo. 3, c. 116 ; 16 & 17 Vict. c. 117). *Trade Marks Registration* (38 & 39 Vict. c. 91 ; 39 & 40 Vict. c. 33 ; 40 & 41 Vict. c. 37). *Trustee Acts*, 1850 and 1852 (13 & 14 Vict. c. 60 ; 15 & 16 Vict. c. 55) ; *Trustee Act*, 1888 (51 & 52 Vict. c. 59) ; and *Trustee Acts*, 1893 and 1894 (56 & 57 Vict. c. 53 ; 57 & 58 Vict. c. 10), repealing, but (in effect) re-enacting the *Confirmation of Sales Act* (25 & 26 Vict. c. 108) ; and the *Trustee Relief Acts* (10 & 11 Vict. c. 90 ; and 12 & 13 Vict. c. 74). *Trustees Relief and Law of Property Amendment* (22 & 23 Vict. c. 35 ; 23 & 24 Vict. c. 38) ; and *Vendors and Purchasers* (37 & 38 Vict. c. 78).

(*q*) 12 & 13 Vict. cc. 26, 110 ; 13 & 14 Vict. c. 17.

(*r*) *Lucena v. Lucena*, 5 Beav. 249 ; *Garth v. Townsend*, Law Rep. 7 Eq. 220 ; and see (as to illusory appointments and non-exclusive powers generally) 11 Geo. 4 & 1 Will. 4, c. 46 ; and 37 & 38 Vict. c. 37.

(*s*) *Hall Dare v. Hall Dare*, 31 Ch. D. 251.

Thirdly, as to the Procedure in Equity.—This is a matter which will be specially treated of, in a separate chapter,—that is to say, in the chapter which will follow next after the chapter which treats of the proceedings generally in an action; and for the present, it will be sufficient, as further exemplifying the nature of the relief in equity and (roughly) the procedure in equity, to notice, with some particularity, the four following species of equitable relief, namely, 1st, the execution of trusts; 2ndly, the specific performance of contracts; 3rdly, an injunction; and 4thly, the perpetuation of testimony.

1st. The means for the protection and enforcement of trusts, are, in general, either by action, or by petition; but the relief on summons (originating or ordinary) is also now extensively available. The relief given may be, *e.g.*, to compel the trustees to account for trust money received (*t*); or to compel a sale of the trust property, and a due application of the sale proceeds under the direction of the court; or to set aside some disposition of the trust property made in breach of trust, and with a guilty knowledge on the part of the purchaser as well as of the trustee (*u*). And we ought more particularly to mention proceedings for the *administration of assets*,—involving the payment of debts and legacies, and the distribution of residues, out of the estates, (whether legal or equitable,) of deceased persons, including the due *marshalling* of the assets so as to ensure as far as may be the payment of all the beneficiaries in full (*x*); and the passing of the accounts of such estates,—which proceedings may be instituted either by a creditor, legatee, or next of kin; or even by the personal representative himself, when

(*t*) *Bostock v. Floyer*, Law Rep. 1 Eq. Ca. 26; *Budge v. Gummow*, *ib.*, 7 Ch. App. 719.

(*u*) *Tate v. Williamson*, Law Rep. 1 Eq. Ca. 528.

(*x*) *Spence*, Eq. Jur. vol. ii. 826; *Ram on Assets*, chap. xxviii.

disinclined to undertake the sole responsibility of administering the assets (*y*) ; and all these proceedings wholly belong to the province of equity, as in a legal action effect only is given to the claim of the particular suitor (whether creditor or legatee), without ever undertaking a general distribution of the assets (*z*). And it forms one of the provisions of the Judicature Acts, that, in the administration of the assets of any person who may die after those statutes came into operation and whose estate may prove to be insufficient for the payment in full of all his debts and liabilities—and in the winding up of any company under the Companies Acts, 1862 to 1898, whose assets may prove insufficient for the payment of the company's debts and liabilities and the costs of winding up,—the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to the debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities respectively, as may be in force for the time being under the *law of bankruptcy*, with respect to the estates of persons adjudged bankrupt (*a*).

The legislature during the present reign has also been unusually active in its provisions on the subject of trusts. Thus, by the Trustee Relief Act, 1847, (10 & 11 Vict. c. 96,) now repealed (its provisions being however re-enacted) by the Trustee Acts, 1893 and 1894 (56 & 57 Vict. c. 53, and 57 & 58 Vict. c. 10), all trustees, executors, administrators, or other persons having in their hands moneys belonging to *any trust*, are enabled to pay over the same, with the privity of the paymaster-general, to the Bank of England, (or to transfer any stock or government securities standing in their names into the name of such paymaster-general,) *in trust to attend the*

(*y*) 15 & 16 Vict. c. 86, ss. 45—
47 ; Order lv. (1883).

(*z*) *Doe v. Guy*, 3 East, 123 ; 2
Saund. by Wms. 137 (c), 6th edit.

(*a*) 38 & 39 Vict. c. 77, s. 10.

orders of the court, the receipt given being (or operating as) a discharge to the trustees for the moneys so paid (or stocks or securities so transferred): Also, by Lord St. Leonards' Act (22 & 23 Vict. c. 35), ss. 26, 30, and 31, and Lord St. Leonards' Act Amendment Act, (23 & 24 Vict. c. 38,) s. 9, all which sections have now been repealed by the Trustee Act, 1893, the like provisions being thereby or otherwise enacted in lieu thereof, no trustee, executor, or administrator making any payment, or doing any act *bonâ fide* under a power of attorney, shall be liable for what is so done, by reason that the person who gave the power was dead at the time of such payment or act, or had done some act to avoid the power (*b*); and any trustee, executor, or administrator, may apply to an equity judge at chambers, for his opinion or direction respecting the management or administration of the trust property or of the assets,—and by acting on such opinion or direction, shall be deemed, so far as regards his own responsibility, to have discharged his duty; and every instrument creating a trust, either expressly or by implication, shall be deemed to contain a clause to the effect following, viz. that the trustees or trustee shall be chargeable only for what they shall respectively actually receive, notwithstanding their signature of any receipt for the sake of conformity,—and shall be answerable only for their own acts and neglects, and not for those of each other, nor for any person with whom any trust fund may be deposited, nor for any deficiency of any securities, unless through their own wilful default. And by Lord Cranworth's Act (23 & 24 Vict. c. 145), ss. 1—7, but which Act was not retrospective, it was provided, that in all cases where, by any instrument of settlement, it was

(*b*) And see also 44 & 45 Vict. c. 41, ss. 46—48, and 45 & 46 Vict. c. 39, ss. 8, 9, which make this provision general, and also provide

for the power of attorney being made irrevocable either generally or for a specified time not exceeding one year.

expressly declared that trustees (or other persons therein indicated) should have a power of sale over any hereditaments, it should be lawful for such trustees (or other persons), whether such hereditaments were vested in them or not, to exercise such power of sale, by selling the same, either together or in lots, and either by auction or by private contract ; and although this Act has been repealed (in part) by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), and (as to the rest) by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), the like provisions were re-enacted by the 35th section of the Conveyancing Act, 1881, and have been re-enacted by (and are now contained in) the 13th section of the Trustee Act, 1893.

It was also provided by Lord Cranworth's Act, that trustees, with trust money in their hands, which it was their duty to invest at interest, might, in their discretion, invest the same in any of the securities in the Act specified (*c*),—which was an extension of the range of investments for trust moneys authorized by Lord St. Leonards' Act (*d*), and Lord St. Leonards' Act Amendment Act (*e*); and also, that trustees might provide

(*c*) 23 & 24 Vict. c. 145, s. 25.

(*d*) 22 & 23 Vict. c. 35, s. 32.

(*e*) Under the 23 & 24 Vict. c. 38, ss. 10, 11,—“*Cash under the control of the court*” might be invested in (1) The consolidated £3 per cent. annuities; (2) Reduced £3 per cent. annuities; (3) New £3 per cent. annuities; (4) Bank stock; (5) East India stock; (6) Exchequer bills; (7) £2 10s. per cent. annuities; or (8) On mortgages of freehold or copyhold estates in England or Wales; and now, by Order xxii. rule 17 (November, 1888), such cash may

be invested in the following stocks, funds, or securities :—(1) Two and three-quarters per cent. consolidated stock (to be called after the 5th of April, 1903, two and a half per cent. consolidated stock); (2) Consolidated £3 per cent. annuities; (3) Reduced £3 per cent. annuities; (4) £2 15s. per cent. annuities; (5) £2 10s. per cent. annuities; (6) Local loans stock under the National Debt and Local Loans Act, 1887; (7) Exchequer bills; (8) Bank stock; (9) India three and a half per cent. stock; (10) India three per cent. stock;

out of the trust funds, for the maintenance and education of infant *cestuis que trustent* ; and the same Act contained various other provisions, as for the appointment of new trustees in the event of any trustees dying or becoming unfit to act, or being desirous of being discharged from acting (*f*) ;—and also making the receipts in writing of any trustees, for money payable to them as trustees, sufficient discharges, and effectually exonerating the party paying, without his being required to see to the application thereof,—all which enactments have been re-enacted, and made more comprehensive and also retrospective by the Conveyancing Act, 1881, and the Settled Land Act, 1882, before mentioned,—or, now, the Trustee Act, 1893.

Also, by the Trustee Act, 1888 (*g*), by way of relieving trustees (not being fraudulent or culpable) from certain rules of the Chancery Division which the legislature thought bore too hardly upon them, it was provided, that they might in certain cases authorize their solicitor to receive the trust moneys (s. 2) ; and might also authorize their solicitor or any banker to receive any policy moneys subject to the trust (s. 2) ; and might sell, under proper conditions of sale, without any fear of being thereafter

(11) India guaranteed railway stocks or shares, provided, in each case, that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment ; (12) Stocks of colonial governments guaranteed by the Imperial Government ; (13) Mortgages of freehold and copyhold estates respectively in England and Wales ; (14) Metropolitan consolidated stock, £3 10s. per cent. ; (15) Three per cent. Metropolitan consolidated stock ; (16) Debenture preference guaranteed or rent-

charge stocks of railways in Great Britain or Ireland having, for ten years next before the date of investment, paid a dividend on ordinary stock or shares ; or (17) Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, provided, in each case, that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of investment.

(*f*) *In re Tempest*, Law Rep. 1 Ch. Ap. 485.

(*g*) 51 & 52 Vict. c. 59.

made liable for the conditions of sale being deemed depreciatory (s. 3); and might lend trust funds to the extent of two-thirds the value of the security as reported to them by a valuer (s. 4); and should be protected to the extent of the amount so lent, and liable only for the excess beyond such amount (s. 5); and should be entitled, as against married women (although restrained from anticipation), equally as against other *cestuis que trustent*, to impound their beneficial interests to make good the breach of trust (s. 6); and might insure buildings to the extent of three-fourths their value (s. 7); and might plead the Statutes of Limitation as a protection against liability for breaches of trust of a merely technical character (s. 8); and might (if authorized to invest on real securities) invest in the security of long terms of years not being onerous leaseholds (s. 9); and might renew renewable leaseholds (s. 10); and might raise the moneys necessary for such renewals, by mortgage of the trust premises (s. 11),—all which provisions were made retrospective (s. 12); but they were not to authorize any trustee to do what he was expressly forbidden by the trust instrument to do, or to omit to do what he was thereby expressly required to do (s. 12). But all the provisions of the Trustee Act, 1888, above summarized, save only the provision regarding the Statutes of Limitations, have now been repealed by the Trustee Act, 1893 (*h*); and they have at the same time been re-enacted by the last mentioned Act, which is a Consolidation Act.

Lastly, under the Judicial Trustees Act, 1896 (*i*), whereby the court is enabled to appoint a judicial trustee, a trustee (whether appointed under that Act or not) may be relieved (in whole or in part) from his liability for a breach of trust, where the court is of opinion, that he has

(*h*) 56 & 57 Vict. c. 53, amended by the 57 & 58 Vict. c. 10. (*i*) 59 & 60 Vict. c. 35, s. 3.

acted honestly *and* reasonably in the matter, and that he ought to be excused for having omitted to obtain the directions of the court for his guidance (*k*).

2ndly. The Court of Chancery exercises also the jurisdiction of *decreeing the specific performance of agreements*, instead of giving redress by way of damages for their non-performance,—and this on the ground that, *in favour of a purchaser*, that which ought to be done shall, in equity, be considered as actually done, and at the time when it ought originally to have been done,—a jurisdiction which is said to have existed as early as the reign of Edward IV. (*l*). This mode of relief, indeed, is confined, generally speaking, to contracts regarding lands, it not being the ordinary practice in equity to enforce the specific performance of agreements relating to personalty,—for the breach of these latter may in general be adequately redressed by an award of damages (*m*). But contracts for the purchase of land or the like (including contracts for leases) will be decreed to be specifically performed (*n*); and (under particular circumstances) even covenants to execute disentailing deeds will be specifically enforced (*o*); and in all cases of an agreement for the sale and purchase of land, though the legal estate remains in the vendor till the conveyance is completely executed, the vendor is in equity considered as having become a *trustee* for the vendee from the time specified in the contract (*p*); and the vendee, on the other hand, to have become a trustee for the vendor from the same period, so far as the purchase money is concerned (*q*).

(*k*) *Barker v. Ivimey*, [1897] 1 Ch. 536; *Smith v. Stuart*, [1897] 2 Ch. 583.

(*l*) 1 Mad. Chan. p. 361.

(*m*) *Mortlock v. Buller*, 10 Ves. jun. 315.

(*n*) 36 & 37 Vict. c. 66, s. 34, sub-s. (3); *Walsh v. Lonsdale*, 21 Ch. D. 9.

(*o*) *Bankes v. Small*, 36 Ch. D. 716.

(*p*) *Lysaght v. Edwards*, 2 Ch. Div. 499.

(*q*) *Watson v. Rose*, 10 H. L. Ca. 672; *Levy v. Stogdon*, [1898] 1 Ch. 478.

The Court of Chancery was also latterly enabled to give (and the Chancery Division may still give) damages either in addition to or in lieu of specific performance (*r*).

3rdly. With reference to *injunctions*, it is to be observed, that, prior to the Judicature Acts, relief of this equitable nature was almost exclusively to be sought in the Court of Chancery; and in all those cases in which the Court of Chancery could alone have originally granted this relief, the action for an injunction should still be brought in the Chancery Division of the High Court of Justice (*s*),—although, now, any division of the court may, in a proper case, grant this relief, it forming one of the provisions of the Judicature Act (36 & 37 Vict. c. 66), s. 25, that an injunction may be granted by an *interlocutory* order of the court in all cases in which it shall appear to the court to be “*just or convenient*” that such order should be made (*t*). And as to the nature of the application itself, it usually seeks to restrain, either till the hearing of the action or permanently, acts in violation of the applicant’s rights or alleged rights, *e.g.*, the infringement of a patent or copyright, or the commission of waste or nuisance; and in cases of an urgent nature (but only in such cases), the injunction may (if the case be supported by a proper affidavit,) be obtained *ex parte*, that is to say, without any previous notice to the opposite party.

The injunction is usually *prohibitory*; but in exceptional cases, it is *mandatory*, *i.e.*, indirectly securing the performance of some act or the restoration of the original *status quo* (*u*).

(*r*) 21 & 22 Vict. c. 27 (Lord Cairns’ Act); *Anglo-Danubian Company v. Rogerson*, Law Rep. 4 Eq. 3.

(*s*) *Flower v. Local Board of Low Leyton*, 5 Ch. D. 347.

(*t*) *Day v. Brownrigg*, 10 Ch. Div. 294; *Beddow v. Beddow*, 9 Ch. D. 89.

(*u*) *Tulk v. Moxhay*, 2 Phill. 774; *Van Joel v. Hornsey*, [1895] 2 Ch. 774.

An injunction also used sometimes to restrain a person from prosecuting his legal action, or from enforcing a judgment he had obtained therein ; but, with regard to the Supreme Court, the Judicature Acts have now provided, that no cause or proceeding pending in the High Court of Justice or before the Court of Appeal shall be restrained either by prohibition or injunction,—every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained if the Act had not passed, either unconditionally or on any terms and conditions, requiring now to be relied on by way of *defence* to the action ; and these courts may also now direct a stay of proceedings in any cause or matter pending before them (*x*). But an injunction may, in a proper case, still issue to restrain the *institution* of legal proceedings in the High Court (*y*),—or indeed in any court (domestic or foreign).

4thly. As to the *perpetuation of testimony*. The examination of witnesses used never to take place in a legal action, except with reference to matters in respect of which some proceeding had been already commenced ; and the law is so still. But it is sometimes very material for the protection of existing rights, that the evidence relating to them should be taken and preserved, *though they may not yet be the subject of any legal proceedings*,—the position of the parties interested being such as not yet to afford any opportunity for litigation,—while at the same time there may be reasons for expecting a future contest of the right, and that at a period when the witnesses (now competent to give material evidence upon it) may have been removed by death (*z*). In such cases, therefore, the

(*x*) 36 & 37 Vict. c. 66, s. 24, sub-s. (5); *Ex parte Reynolds*, 15 Q. B. D. 169; *Cobbold v. Pryke*, 4 Exch. Div. 315; *Ex parte Ditton*, 1 Ch. D. 557.

(*y*) *Cercle Restaurant v. Lavery*, 18 Ch. Div. 555.

(*z*) *Earl Spencer v. Peek*, Law Rep. 3 Eq. Ca. 415; *Woolridge v. Norris*, Law Rep. 6 Eq. Ca. 413.

Chancery Division lends its aid, by permitting any of the parties interested to institute proceedings against the rest, *with a view to the mere perpetuation of the testimony*, and without reference to any other present relief; and this is effected by taking down the examinations or depositions of the witnesses,—which, in the event of the right being tried at any future period when the attendance of the witnesses can no longer be procured, may be received in evidence between the same parties or those claiming under them. And with a view to extending the application of so convenient and important a remedy, it was enacted, by the 5 & 6 Vict. c. 69, that any person who, upon the happening of any future event, would (under the circumstances alleged by him to exist) become entitled to any honour, title, dignity, or office (or to any estate or interest in property real or personal), the right or claim to which cannot by him be brought to trial before the happening of such event, might take proceedings in equity, to perpetuate any testimony material for establishing such claim or right (a); and, by the 21 & 22 Vict. c. 93 and 22 & 23 Vict. c. 61, s. 7, a jurisdiction of a somewhat similar (though more limited) kind was conferred on the Divorce Court (and is now vested in the Divorce Division of the High Court), with reference to questions of legitimacy and nationality (b).

(a) Ord. xxxvii. (1883), rr. 35—
38; *Marquis of Bute v. James*,
33 Ch. Div. 157.

(b) *Frederick v. Att.-Gen.*, L.R.
3 P. & M. 270; *supra*, vol. II.
p. 229.

CHAPTER IX.

OF THE LIMITATION OF ACTIONS.

THE Statutes of Limitation have for their object to preserve the peace of the kingdom (*interest reipublicæ, ut sit finis litium*),—and to prevent those innumerable perjuries which might ensue, if a man were allowed, at any distance of time, to bring his action for an injury committed (*a*) ; and it is to be remembered also, that a supine claimant is entitled to no favour or protection from the law,—for *vigilantibus (non dormientibus) jura subveniunt*.

The course of legislation upon the subject under consideration obliges us to treat separately (1) the statutory limitations which are applicable to land; and (2) the statutory limitations which are applicable to things other than land.

I. LAND, THE STATUTES OF LIMITATION AS APPLICABLE THERETO.—It was with reference to *real* actions, that the law of limitations was first established ; and, originally, such actions were limited from some particular event, or fixed era,—for, by the antient law in the time of Henry the Second, the demandant (in a writ of right) could not claim upon any seisin earlier than the reign of Henry the First ; and afterwards, by the Statute of Merton, (20 Hen. III. c. 8,) he could not claim upon any seisin earlier than the reign of Henry the Second, or by the Statute of

(a) 3 Bl. Com. 308.

Westminster the first, (3 Edw. I.) c. 39, upon any seisin earlier than the reign of Richard the First (*b*) ; and the same species of limitation, though from more recent dates, was from time to time appointed for many other kinds of real action. But these dates, in process of time, became (in effect) no limitation at all,—which gave rise at length to the Statute of Limitations, 32 Hen. VIII. c. 2, whereby the limit of *thirty* years, if the demandant claimed on his own seisin, and of *fifty* (or, in some cases, *sixty*) years, if he claimed on the seisin of his ancestor, was fixed for real action (*c*) ; and afterwards, by the 21 Jac. I. c. 16, s. 1,—that is to say, for *possessory* actions,—it was enacted, that no person should make *entry* into any lands or hereditaments, but within twenty years after his right of entry should have first accrued (*d*).

And thus stood the doctrine of limitation in general, so far as relates to real property, from the dates of these statutes respectively till the reign of William the Fourth,—when the statute 3 & 4 Will. IV. c. 27, was passed, the provisions of which (as slightly amended by the 37 & 38 Vict. c. 57), are the provisions now in force,—and they will be presently stated. But before proceeding to them, it is convenient to mention, that there originally existed no statute of limitations that was applicable to *claims by the crown*,—the maxim being *nullum tempus occurrit regi*, and the 32 Hen. VIII. c. 2 not having been so framed as to bind the crown's rights ; and although by

(*b*) 3 Bl. Com. p. 196 ; Com. Dig. Temps. (G).

(*c*) 3 Bl. Com. 189. This statute extended also to *rents, suits, and services*, but only to those which were incidents of tenure, and not to those created by deed, or reserved on a particular estate, or on copyhold grants ; and it did

not extend to *casual* services such as by possibility might not become due within the period of limitation (Com. Dig. Temps. (G), 9 ; *Hollins v. Verney*, 11 Q. B. D. 715 ; 13 Q. B. D. 304).

(*d*) Christ. Bl. Com. vol. iii. p. 204, n. (2) ; p. 206.

the 21 Jac. I. c. 2, the sixty years next precedent to the 19th February, 1623, was the period of limitation fixed for crown claims (*e*), that limitation soon became ineffectual by the efflux of time. It was, however, at length provided, by the 9 Geo. III. c. 16, that in suits relating to land, the crown should be bound by the lapse of sixty years ; and by that statute,—as amended in certain points by the 24 & 25 Vict. c. 62,—the law relating to this subject is still governed.

Also, up to the reign of William the Fourth there was no limitation with regard to the time within which actions concerning *advowsons* were to be brought,—at least none later than the times of Richard the First and Henry the Third ; for, by the 1 Mar. sess. 2, c. 5, the 32 Hen. VIII. c. 2, was declared not to extend to any writ of right of advowson, or writ of *quare impedit*, or assize of darreign presentment, or writ of *jus patronatús* (*f*),—the reason having been, because the title to an advowson might not come in question within the period of sixty years ; and instances are not wanting of two successive incumbencies having continued for upwards of a hundred years (*g*).

The opinion having become prevalent, that *twenty* years was a reasonably sufficient time in every case for the recovery of corporeal hereditaments,—unless where the claimant laboured under some disability,—this opinion was carried into effect by the 3 & 4 Will. IV. c. 27 (*h*) ; but it having since been considered, that even that space of time is more than enough, the period of *twelve* years has

(*e*) 3 Inst. 189 ; and see also 21 Jac. 1, c. 14, as regards *informations of intrusion*, where the crown has been out of possession for twenty years.

(*f*) 3 Bl. Com. 250 ; 7 Ann. c. 18.

(*g*) 3 Bl. Com. 251.

(*h*) *Grant v. Ellis*, 9 Mee. & W. 113 ; *Owen v. De Beauvoir*, 16 Mee. & W. 547 ; *Howitt v. Harrington*, [1893] 2 Ch. 497.

been established by the 37 & 38 Vict. c. 57 (The Real Property Limitation Act, 1874); and by force of these two Acts (and of the 7 Will. IV. & 1 Vict. c. 28, explaining the 3 & 4 Will. IV. c. 27), the law now is:—
 (1) That after the 1st January, 1879 (*i*), no entry or distress upon, or action to recover, any land or rent (*k*), can be brought (otherwise than by the crown),—unless within *twelve* years next after the time at which the right to make the entry or distress, or to bring the action, shall have *first accrued* to the person making or bringing the same (*l*),—it being provided, however, that if, at the time at which the right of any person shall *first accrue*, such person shall be under the disability of infancy, coverture, idiocy, lunacy, or unsoundness of mind (*m*), then he (or the person claiming through him) may (though twelve years have expired) enter, distrain, or sue within the six years next after the person to whom the right accrued shall have died or ceased to be under disability, whichever event shall first happen (*n*); but no such right of entry, distress, or action, shall be exercised, except within *thirty* years next after the right accrues,—even though the disability may have attached during the whole of the thirty years, or although the term of six years above mentioned shall not have yet expired (*o*). And it being necessary to define with exactness the time at which the right of entry shall

(*i*) The 3 & 4 Will. 4, c. 27, came into force the 1st January, 1833; and the 37 & 38 Vict. c. 57, came into force on the 1st January, 1879.

(*k*) “Rent” extends to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged on land,—other than moduses or compositions belonging to a spiritual or eleemosynary corporation sole. (*Irish*

Land Commission v. Grant, 10 App. Ca. 14.)

(*l*) 3 & 4 Will. 4, c. 27, s. 2; and 37 & 38 Vict. c. 57, s. 1.

(*m*) Prior to 37 & 38 Vict. c. 57, s. 4, “*absence beyond seas*” used to be (but no longer is) a disability; and coverture cannot (since the Married Women’s Property Act, 1882) be regarded as a disability.

(*n*) Sect. 3; *Borrows v. Ellison*, Law Rep. 6 Exch. 128.

(*o*) Sect. 5.

have *first* accrued, the 3 & 4 Will. IV. c. 27, ss. 3—9, and the 37 & 38 Vict. c. 57, s. 2, have (by their combined effect) provided, that, in the following cases, the right of entry shall be deemed to have first accrued as follows :—

In the case of a person in possession,—on his dispossession ; in the case of an heir or devisee entitled to the possession,—on the death of his testator or ancestor who has died in possession ; in the case of a grantee by deed in possession,—on the execution of the deed ; in the case of remaindermen and reversioners, and persons entitled to other future estates,—on their remainders, reversions, or other future estates falling into possession ; and in the case of remaindermen and others becoming entitled to possession by reason of any forfeiture or breach of condition,—on the occurring of such forfeiture, or on the breach of such condition, or (but in the case of remaindermen and reversioners only) at the time when their remainders or reversions would have fallen into possession if there had been no such forfeiture or breach of condition (*p*). But as regards all remainders, reversions, and future estates expectant on a particular estate (the owner of which particular estate shall have been, and until the determination thereof continued to be, dispossessed), the right of entry will be wholly barred at the expiration of one or other (whichever shall be the longer) of the two following periods,—that is to say, twelve years from the dispossession of the particular estate, or six years from its determination (*q*),—at which time also (*i.e.*, on the expiration thereof) will be barred all (if any) titles created subsequently to such dispossession of the particular estate, out of or in the remainders or reversions thereon (*r*).

(*p*) *Sturgis v. Darell*, 4 H. & N. 622.

(*q*) *Pedder v. Hunt*, 18 Q. B. D. 565 ; *White v. Earl of Devon*, [1896] 2 Ch. 562.

(*r*) In the case of reversions on tenancies at will, the right of entry first accrues on the determination of the will, or (at the latest) on the expiration of one year from the

And (2) As regards tenancies in tail, when the right of entry of a tenant in tail is barred, all estates which he had power to bar are also barred ; and where a tenant in tail dies before his right of entry is barred, the right of entry in respect of all estates which he had power to bar, shall be barred on the expiration of the period which would have barred the tenant in tail himself if he had so long lived ; also, a person in possession under a base fee created by any tenant in tail, shall, after twelve years from the time when such tenant in tail might (without the consent of any other person) have created a fee simple absolute, acquire the fee simple absolute,—unless in the meantime the person entitled to the remainder or other future estate has recovered the possession (*s*).

And (3) As regards proceedings in *equity*, no person claiming any land or rent in *equity*, may bring proceedings to recover the same, but within the period during which he might have entered, distrained, or brought an action for the recovery thereof, if his estate had been legal instead of equitable (*t*) ; but, as regards land or rent vested in any trustee upon an express trust, the right of the *cestui que trust* (or any one claiming through him) to sue the trustee (or any one claiming through him) first accrues, when the land or rent has been conveyed to a purchaser for a valuable consideration,—*scil.*, the right to set aside the sale, even as against the purchaser (or any person claiming through him) (*u*) ; and as regards cases

commencement of the tenancy ; and in the case of reversions on tenancies from year to year (not being by lease in writing), at the end of the first year, or (at the latest) on the last payment of rent (*White v. Earl of Devon, supra*) ; and in the case of reversions on leases in writing (reserving 20s. or more of annual rent), on such

rent being received adversely by a person wrongfully claiming such reversion.

(*s*) 3 & 4 Will. 4, c. 27, ss. 21—23 ; 37 & 38 Vict. c. 57, s. 6 ; *Austen v. Llewellyn*, 9 Exch. 276 ; *Dawkins v. Lord Penrhyn*, 6 Ch. D. 318.

(*t*) 3 & 4 Will. 4, c. 27, s. 24.

(*u*) Sect. 25.

of concealed fraud, the right to sue first accrues when the fraud was (or, with reasonable diligence, might have been) first known or discovered by the person injured (*x*),—but not so as to enable the owner of the land or rent to sue any *bonâ fide* purchaser, who did not assist in the commission of the fraud, and who (at the time of his purchase) did not know, and had no reason to believe, that the fraud was being committed (*y*); and nothing in the Acts contained shall interfere with any rule of equity in refusing relief (on the ground of *acquiescence* or otherwise) to any person whose right to bring the suit may *not* be barred by virtue of the statute (*z*). And as regards mortgaged estates, when the mortgagee obtains the possession, the mortgagor (or any person claiming through him) may not take proceedings to redeem the mortgage, except within twelve years next after the time at which the mortgagee obtained the possession (*a*),—unless the mortgagee shall in the meantime by writing under his hand have acknowledged the mortgagor's title or his right of redemption, which written acknowledgment may be given either to the mortgagor (or to some person claiming his estate) or to his agent (*b*); and, as between mortgagors and mortgagees, no extension of time is allowed for disabilities (*c*).

Also (4) No action or other proceeding shall be brought to recover any money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any

(*x*) *Gibbs v. Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59.

(*y*) 3 & 4 Will. 4, c. 27, s. 26; *Chetham v. Hoare*, Law Rep. 9 Eq. Ca. 571; *Vane v. Vane*, L. R. 8 Ch. App. 383.

(*z*) Sect. 27; *De Bussche v. Alt*, 8 Ch. Div. 286; *Blake v. Gale*, 31 Ch. Div. 196.

(*a*) *Thornton v. France*, [1897] 2 Q. B. 143.

(*b*) 7 Will. 4 & 1 Vict. c. 28; 37 & 38 Vict. c. 57, s. 7.

(*c*) *Kinsman v. Rouse*, 17 Ch. D. 104; *Forster v. Patterson*, *ib.* 132; *Adnam v. Earl of Sandwich*, 2 Q. B. D. 485; *Heath v. Pugh*, 6 Q. B. D. 34; *Sands to Thompson*, 22 Ch. D. 614; *Newbould v. Smith*, 29 Ch. Div. 882.

land or rent at law or in equity,—or any legacy,—except within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for the same,—unless part of the principal money shall have been paid or an acknowledgment in writing given, and then only within twelve years after such payment or acknowledgment (*d*) ; and as regards such charges on land, although the same should be secured by an express trust, the time is not to be enlarged (*e*).

And (5) No *arrears* of rent or of interest (in respect of any sum of money charged upon or payable out of any land or rent or in respect of any legacy),—or any damages in respect of any such arrears of rent or interest,—shall be recoverable, but within *six* years after the same shall have become due (or been acknowledged in writing to the person entitled thereto or his agent),—excepting that where a prior mortgagee, within one year next before action, has been in possession, the second mortgagee may in his action recover the arrears of his interest for the whole period (although exceeding six years) that the prior mortgagee has been in possession (*f*).

And (6) As regards any spiritual or eleemosynary corporation sole, the period of limitation for the recovery of any land or rent is the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, together with six years after a third person shall have been

(*d*) 37 & 38 Vict. c. 57, s. 8 ;
Jay v. Johnstone, [1893] 1 Q. B. 25,
 189 ; *Barnes v. Glenton*, [1898] 2
 Q. B. 223.

(*e*) 37 & 38 Vict. c. 57, s. 10 ;
Warburton v. Stephens, 43 Ch. D.
 39 ; *In re Owen*, [1894] 3 Ch. 220.

(*f*) 3 & 4 Will. 4, c. 27, s. 42 ;
Edmonds v. Waugh, Law Rep. 1
 Eq. Ca. 418 ; *Ex parte Clarke*, *ib.*
 3 Eq. Ca. 313 ; *Coope v. Cresswell*,
ib. 2 Ch. App. p. 112 ; *Marshfield*
v. Hutchings, 34 Ch. Div. 721.

appointed thereto, if the times of such two incumbencies and six years (taken together) shall amount to the full period of *sixty* years,—and if not, then during such further number of years as will make up the sixty years (*g*).

And (7) As regards patrons seeking to recover rights of advowson or of presentation, the period of limitation is the period during which three clerks in succession shall have held the living, all having obtained possession thereof adversely to the right of the plaintiff ; but if such three incumbencies taken together shall not amount to the full period of sixty years, then sixty years is appointed as the period of limitation (*h*) ; and, on the other hand, if the three incumbencies should exceed one hundred years, then the plaintiff's right to sue is at once barred on the expiration of such one hundred years,—unless, of course, the adverse possession shall, in the meantime, have been interrupted (*i*).

As regards land, the title to which has been registered under the Land Transfer Act, 1897 (*k*), adverse possession has ceased to be a mode of acquiring title to land (sect. 12) ; but when the registration was for a *possessory* title only, and the adverse possession had already commenced at the date of the first registration of the title, that adverse possession does not cease to continue, but may afterwards mature (sect. 12), equally as if the land were not registered

(*g*) 3 & 4 Will. 4, c. 27, s. 29 ; and regarding the time within which the Ecclesiastical Commissioners for England may (as successors of the estates of ecclesiastical corporations) sue for the recovery of land, see *Ecclesiastical Commissioners v. Rowe*, 5 App. Ca. 736 ; and the 3 & 4 Vict. c. 113, therein cited.

(*h*) Sect. 30.

(*i*) Sect. 33. The periods thus limited as above, for enforcing a right to present to or bestow an ecclesiastical benefice, extend to the case where a bishop claims as *patron* ; but the Act does not affect the right of any bishop to collate by reason of *lapse*. (See 6 & 7 Vict. c. 54, s. 3.)

(*k*) 60 & 61 Vict. c. 65.

at all ; and even when the first registration was for an *absolute* title, such adverse possession so commenced as aforesaid will continue and may mature, so as to confer a title as against anyone other than and except a purchaser for value who has purchased under the registered proprietor and who has also registered (sect. 12).

II. THINGS OTHER THAN LAND, THE STATUTES OF LIMITATION AS APPLICABLE THERETO.—(1.) The period of limitation, with respect to most personal actions, was fixed by the 21 Jac. I. c. 16, s. 3 (*l*), whereby actions of trespass (other than trespass to the person), and of detinue, trover (*m*), and replevin ; and actions for an account (other than between merchants) (*n*) ; and actions upon the case, except for verbal slander ; and actions of debt on simple contract, or for arrears of rent not due upon specialty (*o*), were limited to *six* years *after the cause of action accrued*,—actions of trespass to the person (*i.e.*, for assault, menace, battery, wounding, and imprisonment) being limited to *four* years, and actions on the case for verbal slander being limited to *two* years ; and these limitations still apply,—there being the usual exceptions, of course, in favour of persons labouring under *disability* (*p*) ; for if the person *entitled to sue* should (when the cause of action accrues) be an infant or *non compos*, he (or she) may sue within the same period after the removal of the disability (*q*) ; but as regards married women, they are not now under disability by reason merely of their coverture ; and *imprisonment*, or

(*l*) *Collinge v. Heywood*, 9 Ad. & Ell. 633 ; *Bonomi v. Backhouse*, 9 H. of L. Cases, 503 ; *Mitchell v. Darley Main Colliery Company*, 14 Q. B. D. 125.

(*m*) *Wilkinson v. Verity*, Law Rep. 6 C. P. 206 ; *Spackman v. Foster*, 11 Q. B. D. 99.

(*n*) *Cottam v. Partridge*, 4 Man. & G. 271 ; but see now 19 & 20 Vict. c. 97, s. 9.

(*o*) 21 Jac. 1, c. 16, s. 3.

(*p*) Sect. 7.

(*q*) *Le Veux v. Berkeley*, 5 Q. B. 836 ; *Townsend v. Deacon*, 3 Exch. 706.

being *beyond the seas* is no longer a disability (*r*).,—*scil.*, in a plaintiff; for as regards a defendant beyond the seas, the 4 & 5 Anne, c. 3, s. 12, stayed (in effect) the running of the statute in his favour (*s*).,—but as regards co-defendants, the 19 & 20 Vict. c. 97, s. 11 has enacted, that where the cause of action lies against two or more joint debtors, the person entitled to sue, although entitled to an extension of time as against the one of them who is beyond the seas, shall not be entitled to any extension of time, against the other or others of them who were not beyond the seas, when the cause of action accrued (*t*).

The operation of the statute of James, with respect to actions upon *simple contract*, was at one time considerably narrowed, by the doctrine which prevailed, that not only a payment on account of principal or interest, but any mere verbal acknowledgment, made before action brought, to the effect that the debt was due,—would suffice to take the case *out of the statute*, by raising an implied promise to pay the debt; upon which promise, (as upon a new cause of action,) the same time for instituting proceedings would again have been allowed as upon the original contract (*u*); but the law on this subject has been since materially altered; for, by Lord Tenterden's Act (9 Geo. IV. c. 14, s. 1), it was enacted, that in actions grounded upon any simple contract, no acknowledgment, or promise, should be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the 21 Jac. I. c. 16,—

(*r*) 19 & 20 Vict. c. 97, s. 10; *Cornil v. Hudson*, 8 Ell. & Bl. 429; *Pardo v. Bingham*, Law Rep. 4 Ch. App. 735.

(*s*) By 19 & 20 Vict. c. 97, s. 12, no part of the United Kingdom, Man, Guernsey, Jersey, Alderney, and Sark, nor the adjacent islands, being part of the dominions of her

Majesty, shall be deemed “beyond seas” within the meaning of the 4 & 5 Ann. c. 3.

(*t*) *Towns v. Mead*, 16 C. B. 123

(*u*) *Bateman v. Pindar*, 3 Q. B. 574; *Maber v. Maber*, Law Rep. 2 Exch. 153.

unless such acknowledgment or promise was contained in some *writing*, containing or amounting to a promise to pay (*x*), signed by the party to be charged, or by his duly authorized agent (*y*) ; and that where there were two or more joint contractors, no such joint contractor should be chargeable, in respect only of the written acknowledgment of the other ; and, by the 19 & 20 Vict. c. 97, s. 14 (*z*), it has been since provided, (with reference to the statute of James as bearing upon the effect of a *payment* on account of principal or interest in respect of a joint contract or debt,) that no co-contractor or co-debtor shall lose the benefit of the limitation of the statute of James, by reason only of any payment by the other or others (*a*).

(2.) The statute of 21 Jac. I. c. 16 was inapplicable to debts arising on instruments *under seal*,—that is to say, to *specialty* debts ; but it became the practice, upon the trial of actions for specialty debts, for the judge to recommend the jury, where no payment on account of principal or interest had been made or demanded within twenty years, to presume that the specialty had been satisfied ; and it was afterwards enacted, by the 3 & 4 Will. IV. c. 42, s. 3, that all actions (of debt for rent upon any indenture of demise, or of covenant, or) of debt on any bond or other specialty,—and all proceedings on

(*x*) *Spong v. Wright*, 9 Mee. & W. 629 ; *Hart v. Prendergast*, 14 Mee. & W. 741 ; *Willins v. Smith*, 4 Ell. & Bl. 180 ; *Cornforth v. Smethard*, 5 H. & N. 13 ; *Tanner v. Smart*, 6 B. & C. 603 ; *Lee v. Wilmot*, Law Rep. 1 Exch. 364 ; *Chasemore v. Turner*, *ib.* 10 Q. B. 500 ; *Quincey v. Sharpe*, 1 Ex. D. 72 ; *Skeet v. Lindsay*, 2 Ex. D. 314 ; *Meyerhoff v. Froehlich*, 3 C. P. D. 333 ; *Banner v. Berridge*, 18 Ch. D. 254 ; *Sanders v. Sanders*,

19 Ch. D. 373 ; *Curwen v. Milburn*, 42 Ch. D. 424 ; and *disting. Green v. Humphreys*, 26 Ch. D. 474.

(*y*) 19 & 20 Vict. c. 97, s. 13.

(*z*) *Jackson v. Woolley*, 8 Ell. & Bl. 778 ; *Cockrill v. Sparkes*, 1 Hurl. & C. 699.

(*a*) *Cleave v. Jones*, 20 L. J. Exch. 238 ; *Dick v. Fraser*, [1897] 2 Ch. 181 ; *Astbury v. Astbury*, [1898] 2 Ch. 111.

recognizances,—should be brought within *twenty years* after the cause of action or proceeding accrued ; and that all actions of debt upon an award, (where the submission was not under seal,) or for a copyhold fine, or for an escape, or for money levied upon any writ of *fiери facias*,—should be brought within *six years* (*b*),—it being, however, provided (as regards disabilities existing at the time of the accrual of the right of action), that the twenty years (or, as the case might be, the six years), should reckon from the determination of the disability,—and as regards infants and persons *non compos*, that provision for disabilities still holds good, but coverture is no longer, *semble*, a disability, and absence beyond the seas is no longer one (*c*). And it was further provided, by the Act (sect. 5), that if any acknowledgment in writing (signed by the party liable or his agent) should have been given of the debt, or any payment made on account of it, the twenty years should again reckon from such acknowledgment or payment ; but where there are several co-contractors or co-debtors, any payment on account by one of them is not now to prejudice the other or others (*d*).

(3.) By the 31 Eliz. c. 5, all suits and indictments upon any *penal statute* must be prosecuted,—where the forfeiture is to the crown alone, within *two years* from the commission of the offence (*e*) ; and where the forfeiture is to a common

(*b*) See also 55 Geo. 3, c. 127, s. 5, with respect to the recovery of the value of *tithes*.

(*c*) 19 & 20 Vict. c. 97, s. 10.

(*d*) 19 & 20 Vict. c. 97, s. 14 ; *Astbury v. Astbury*, [1898] 2 Ch. 111. The twenty years has now (by construction of the courts) been reduced to twelve years, in the case of covenants in mortgage deeds (*Sutton v. Sutton*, 22 Ch. Div. 511) ; and in the case of bonds

collateral to the mortgage (*Fearnside v. Flint*, 22 Ch. Div. 579) ; and in the case of judgments generally, whether charged on land or not (*Jay v. Johnstone*, [1893] 1 Q. B. 25, 189 ; *Bland v. Lord*, [1894] 1 Ch. 147).

(*e*) This statute extended also to all *informations* upon any penal statute ; but so much of it as “ relates to the time limited for “ exhibiting an information for

informer alone, within *one* year (*f*) ; and where to the crown and a common informer jointly, then by the common informer within one year, and by the crown within two years after that year has expired. But this statute, not extending to penal actions at the suit of *the party grieved*, the 3 & 4 Will. IV. c. 42, s. 3, required, that these actions should be brought within *two* years after the offence had been committed, — unless the particular statute which created the forfeiture should have otherwise limited the time for suing.

(4.) Under the 5 & 6 Vict. c. 97, s. 5, the period within which any action might be brought for any thing done under the authority (or in pursuance) of any *local or personal Act of Parliament* was *two years*,—or, in the case of continuing damage, *one* year after the damage had ceased; and under the 11 & 12 Vict. c. 44, s. 8, no action could be brought against any *justice of the peace* for anything done in the execution of his office, unless commenced within *six calendar months* after the act committed ; and there were similar provisions in many different Acts, with respect to *constables* and other public officers acting in purported execution of their duties, the period of limitation varying in the different cases (*g*). But with reference to actions (including prosecutions) against public officers generally, it is now provided, by the Public Authorities

“ a forfeiture upon any penal “ statute ” was repealed by 11 & 12 Vict. c. 43, s. 36 ; which Act, however, goes on to provide (sect. 11), that all informations for offences punishable on summary conviction shall be laid within *six calendar months* from the time when the matter arose, unless the time for the information has been, as it usually is, otherwise specially

limited (*Re Edmondson*, 17 Q. B. 67).

(*f*) *Chance v. Adams*, 1 Ld. Raym. 78 ; *Dyer v. Best*, Law Rep., 1 Exch. 152.

(*g*) 24 Geo. 2, c. 44, s. 8 ; 3 Geo. 4, c. 126, s. 147 ; 7 & 8 Geo. 4, c. 31, ss. 3, 12 ; 5 & 6 Will. 4, c. 50, s. 109 ; c. 76, s. 133 ; 8 & 9 Vict. c. 118, s. 165 ; 9 & 10 Vict. c. 95, s. 138 ; 38 & 39 Vict. c. 55, s. 264 ; 51 & 52 Vict. c. 43, s. 53.

Protection Act, 1893 (56 & 57 Vict. c. 61), that for any alleged default in the execution of their duties by statute or otherwise, or for any act done in the execution or purported execution of such duties, the proceeding shall be taken within six months,—notice prior to action no longer being required, but the proceeding not to be commenced (except at the risk of the plaintiff or prosecutor having to pay costs) without allowing time for the defendant to make tender of amends; and the plaintiff or prosecutor, if unsuccessful, pays the defendant's costs as between solicitor and client (*h*).

(5.) Under the Trustee Act, 1888 (*i*), s. 8, claims by *cestuis que trustent* against their trustees for breaches of trust are also now subject to the ordinary operation of the relevant statutes of limitation (*k*),—the time not running against *cestuis que trustent* who are entitled in remainder or reversion until their interests fall into possession; but the provisions of the Act, which are intended for the protection of innocent trustees only, have no application (1) where the breach of trust was fraudulent; or (2) where the trust property (or the proceeds arisen from the dealing therewith in breach of trust) are still in the hands of the trustees, or having been received by the trustee have been converted by him to his own use (*l*).

And thus much upon the law of limitation—both as regards realty and as regards personalty; and this distinction is to be remarked, namely, that the 3 & 4 Will. IV. c. 27, has the effect of extinguishing the *right*, as well as of barring the *remedy* (*m*); but the

(*h*) *Harrop v. Ossett Corporation*, [1898] 1 Ch. 525.

(*i*) 51 & 52 Vict. c. 59.

(*k*) *How v. Earl Winterton*, [1896] 2 Ch. 626; *Ellis v. Roberts* [1898] 2 Ch. 142.

(*l*) *Jones v. Morgan*, [1893] 1 Ch. 304; *Thorne v. Heard*, [1894] 1 Ch. 599.

(*m*) 3 & 4 Will. 4, c. 27, s. 34; *Dawkins v. Lord Penrhyn*, 6 Ch. D. 318; *Johnson v. Mounsey*, 11 Ch. D. 284.

3 & 4 Will. IV. c. 42, bars the remedy only, and does not extinguish the right,—so that, though I can bring no action to recover a debt on contract, after the expiration of the limited period, there is nothing to prevent my obtaining payment of the debt after that period in any other manner,—as, through the medium of any lien that I may hold on the property of the debtor, or (if I am an executor) by virtue of my right of retainer; but apparently I may not, at least in general, set off a debt the remedy for which is statute-barred (*n*):

We will now summarise (and in tabular form) the prescribed times for bringing actions and suits:

And FIRSTLY, regarding *Land* :—

CHARACTER OF ACTION.	TIMES FOR COMMENCING ACTION.
(1.) Ejectment (otherwise called the action to recover the possession of land):	
(A) In general - -	Twelve years, from right to the possession accrued (<i>o</i>).
(B) Where any disability at time of right to possession accruing.	Six years, from termination of disability, — provided thirty years in all from time the right to the possession accrued be not exceeded.

(*n*) *Walker v. Clements*, 15 Q. B. 1046.

(*o*) The right to the possession accrues,—(1) As regards estates in possession, on the first dispossession; (2) As regards estates in

remainder, on the remainder falling into possession; and (3) As regards estates in reversion, on the reversion falling into possession.

CHARACTER OF ACTION.	TIMES FOR COMMENCING ACTION.
(1.) Ejectment, etc.— <i>cont.</i>	
(c) Where tenant for life has been dispossessed and has continued dispossessed till his death, remainderman must sue.	Within twelve years from the tenant for life's dispossession or within six years from his death.
(d) Where tenant in tail has been dispossessed, and has continued dispossessed till his death, remainderman must sue.	Within twelve years from the tenant in tail's dispossession.
(1A.) Ejectment in equity :	
(A) In general - - -	The same limitation as at law.
(B) Where trustee has tortiously sold to a purchaser.	Twelve years from the sale.
(c) Where there has been a fraudulent dispossession.	Twelve years from the discovery of the fraud.
(d) Where the mortgagee is the plaintiff.	Twelve years from the right to possession.
(1B.) Ejectment against tenant at will or against tenant from year to year under oral agreement.	Twelve years from the end of the first year of the tenancy.
(1C.) Ejectment against ordinary lessees at a rent, paying their rent to the adverse claimant.	Twelve years from the first adverse payment of the rent.

CHARACTER OF ACTION.	TIMES FOR COMMENCING ACTION.
(2.) Action to recover money charged on land (by mortgage, lien, or otherwise), or any legacy.	Twelve years after the right to receive the money or legacy has accrued.
(3.) Action to recover arrears of rent or of interest.	Six years' arrears only recoverable.
(4.) Action to recover glebe lands and the like.	Within sixty years, in general (<i>p</i>).
(4A.) Action to recover advowsons and the like.	Within 100 years, at the most (<i>q</i>).

And SECONDLY, regarding *Property other than Land*:—

CHARACTER OF ACTION.	TIMES FOR COMMENCING ACTION.
(1.) Action of trespass <i>de bonis aspertatis</i> .	Six years.
Action of detinue - -	Six years.
trover - - -	Six years.
replevin - -	Six years.
(2.) Action for libel - - -	Six years.
(2A.) Action for slander - -	Two years.
(3.) Action of assumpsit (including debt on simple contract, and rent on parol letting.	Six years.
(4.) Action of account or on the case generally.	Six years.

(*p*) Or (occasionally) *three* incumbencies.

(*q*) Or (occasionally) *two* incumbencies and six years.

CHARACTER OF ACTION.	TIMES FOR COMMENCING ACTION.
(5.) Action of trespass <i>to the person</i> (including assault, battery, &c.).	Four years.
(6.) Action of debt on <i>specialty</i> contract (including rent under an indenture of lease, — and debts on recognizances):	
(A) In general - -	Twenty years.
(B) When included in a mortgage deed (or otherwise payable out of land).	Twelve years.
(c) When due on any judgment.	Twelve years.
(7.) Action for copyhold fine -	Six years.
(8.) Action for money payable under an award.	Six years.
(9.) Actions on penal statutes -	Two years (<i>r</i>).
(10.) Actions against public officers generally.	Six months.

(*r*) Or (at suit of common informer) one year.

CHAPTER X.

OF THE PROCEEDINGS IN AN ACTION.

WE now proceed to consider the *manner* in which the remedy by action is pursued in the High Court of Justice,—in other words, the proceedings in an action ; and whereas, prior to the 2nd November, 1875, these proceedings were commenced,—when in a court of common law, by *writ of summons* ; and when in the Court of Chancery, by *bill* (or *information*) or *petition* ; and when in the Court of Admiralty, by a *cause in rem* or *in personam* ; and when in the Court of Probate, by a *citation* ; and when in the Court for Divorce and Matrimonial Causes, by a *petition* (*a*),—the Judicature Acts provided, that, on and as from the 2nd November, 1875, all such proceedings should be commenced by a writ of summons (*b*) ; and a “ *Writ of Summons* ” is accordingly the first proceeding in an action,—although (under later rules) a large amount of legal business, more especially in the Chancery Division, may also be commenced by “ *Originating Summons* ” (*c*).

(*a*) The terms “ action ” and “ suit ” were (and are) synonymous ; and by the Judicature Acts, “ suit ” includes “ action,” and “ cause ” includes any action, suit, or other original proceeding between a plaintiff and a defendant (36 & 37 Vict. c. 66, s. 100).

(*b*) Ord. i. (1883), r. 1 ; ii. (1883), r. 1.

(*c*) Under the Judicature Acts, *District Registries* of the Supreme

Court (the registrar being, generally, also the registrar of the county court held in the same place) are established in the country, in places and districts defined by Order in Council ; and in these registries, writs of summons may be issued, and other proceedings taken, such as are prescribed in the rules, down to and including entry for trial ; or (in case of non-appearance by

Confining our remarks for the present to an action in the Queen's Bench Division, we shall consider the proceedings in such action,—pursuing the order and method wherein the proceedings themselves follow each other, namely: (I.) The process; (II.) The pleadings; (III.) The trial and evidence; (IV.) The judgment; (V.) The execution; and (VI.) The appeal.

I. The PROCESS.—The first object in an action is to procure the defendant's *appearance* in court; and accordingly, the writ of summons commands him to appear; and the defendant appears by delivering to the proper officer of the court a memorandum containing the name of his solicitor, or else stating that he defends in person (*d*).

In antient times, there were different writs, of different degrees of stringency, issued consecutively upon each other, where (for any reason) the first writ (or, as it was called, the *original writ*) failed to be effectual (*e*); and the original writ issued originally out of Chancery under the Great Seal; but (after a varying practice in the interval) it was afterwards provided, by the 15 & 16 Vict. c. 76, 17 & 18 Vict. c. 125, and 23 & 24 Vict. c. 126 (Common Law Procedure Acts, 1852, 1854, and 1860) (*f*), that the writ of summons for commencing (*g*) an action

defendant, and in some other cases) down to and including entry of final judgment. The proceedings, however, on the application of any of the parties, may be removed from the district registry to the proper office of the High Court; and, on the other hand, accounts and inquiries may be referred by the High Court to the district registrar (36 & 37 Vict. c. 66, ss. 60—66; 38 & 39 Vict. c. 77, s. 13; 39 & 40 Vict. c. 59,

s. 22; Order in Council, 12th August, 1875).

(*d*) See Ord. xii.

(*e*) All these writs fell under the common term, the *process*,—those subsequent to the first writ being called the *mesne process*, and writs of execution being called the *final process*.

(*f*) *Justice v. Mersey Steel and Iron Company*, 1 C. P. D. 575.

(*g*) Sometimes, before commencing an action, some certificate

should be a writ of summons issued out of the proper office of the court (whether Queen's Bench, Exchequer, or Common Pleas), and tested in the name of the chief (*h*) ; and it has now been provided by the Judicature Acts, that the writ of summons shall be issued out of the central office of the Supreme Court (*i*), and be tested in the name of the Lord Chancellor in all cases ; and the writ is sealed with the seal of that office,—and (when so sealed) it is deemed to be issued (*k*).

The writ of summons must be carefully prepared before taking it to the central office to be issued ; that is to say, there must be the names of the parties (plaintiff or plaintiffs and defendant or defendants) written on the face of the writ ; and there must be written on the back thereof (*i.e.*, indorsed thereon) the following indorsements, namely :—(1) The indorsement of the claim made in the action ; (2) The indorsement of the plaintiff's private address, and of his address for service,—such latter address being his solicitor's office if that is within three miles of the Royal Courts (Central Hall, principal entrance), or else some other specified place within these three miles ; and (3) The indorsement of the plaintiff's solicitor's name and place of business (together with the name and place of business of the town-agent, if any).

And as regards the indorsement of claim on the writ,

(*Glen v. Grey*, 21 Ch. Div. 513), or notice (*Flower v. Low Leyton*, 5 Ch. Div. 347) is a necessary preliminary,—although, in general, no such notice is required (*Goodhart v. Hyatt*, 25 Ch. Div. 182 ; *Upmann v. Forester*, 24 Ch. Div. 241 ; *Wittmann v. Oppenheim*, 27 Ch. Div. 260 ; 56 & 57 Vict. c. 61) ; but plaintiff must, of

course, see to it, that his right of action is complete, before he issues his writ or other originating process (*Frost v. Knight*, L. R. 7 Exch. 111 ; *Synge v. Synge*, [1894] 1 Q. B. 466.

(*h*) 15 & 16 Vict. c. 76, s. 5.

(*i*) 42 & 43 Vict. c. 78, ss. 4, 5.

(*k*) Ord. v. (1883), r. 11.

it is not essential to set forth the precise ground of the plaintiff's complaint, or to express the precise relief which the plaintiff claims (*l*).—because the writ may (under an order of the court giving leave to do so) (*m*) be subsequently amended in both these particulars; but it is desirable, of course, to be accurate in the first instance,—for the reason (among other reasons) that the amended writ must be re-served (*n*). And if the plaintiff sues (or the defendant is sued) in a representative capacity, *e.g.*, as executor or trustee, the indorsement of claim is to show it (*o*). And where the action is for the recovery of a debt or liquidated demand in money, with or without interest, and arises on a contract, or on a statute, or upon a trust, the plaintiff may specially indorse his writ (under Order III. rule 6) with the particulars of the amount sought to be recovered, giving credit (where necessary or proper) for any payment or set-off, and mentioning also a sum for costs, and stating that upon payment of the amount claimed and the specified costs, within the time mentioned on the writ, the action will be stayed; and a landlord (including a mortgagee) (*p*), may, as against his own tenant whose term has expired or been duly determined by notice to quit,—or as against any sub-tenant of the latter,—specially indorse his writ (under Order III., rule 6) with a claim to recover the possession of the land, with or without mesne profits (*q*); but a landlord claiming the possession as for a forfeiture of the lease (*r*) or under a right of re-entry for condition broken (*s*), is not entitled

(*l*) Ord. iii. r. 2.

(*m*) Ord. xxviii. r. 1; and (as to *parties*) Ord. xvi. rr. 2, 11.

(*n*) Ord. xvi. r. 13; xxviii., r. 10.

(*o*) Ord. iii. r. 4.

(*p*) *Daubuz v. Lavington*, 13

Q. B. D. 347; *Kemp v. Lester*, [1896] 2 Q. B. 162.

(*q*) *Southport Tramways v. Gandy*, [1897] 2 Q. B. 66.

(*r*) *Burns v. Walford*, W. N., (1884), 31.

(*s*) *Mansergh v. Rimell*, W. N., (1884), 34.

to proceed by way of special indorsement ; and in every case, a special indorsement is to be described as a statement of claim (*t*).

The writ of summons, so soon after the issue thereof as conveniently may be done, is to be served on the defendant ; and the service is required to be personal (*u*),—that is to say, a copy of the writ must be put into the defendant's hands or left in his presence with (in the latter case) a verbal intimation to him that the slip of paper is a copy writ ; and the plaintiff must also show the original writ to the defendant, if he desires to see it (*x*) ; and the person serving the writ should, immediately (and within three days at the most) after service, indorse on the original the day of the month and week of the service (*y*). And where husband and wife are co-defendants, service on the husband is not *primâ facie* service on the wife, but the wife also must be served,—unless the court otherwise orders (*z*). Where the defendant is an infant, the service is *primâ facie* good if effected on his or her father or guardian, or (if none) then on the person with whom the infant resides, or under whose care he or she is (*a*) ; and where the defendant is a lunatic so found by inquisition, service on his or her committee is good service ; and when a defendant of unsound mind has not yet been found so by inquisition, the service is *primâ facie* good if effected on the person with whom he or she resides, or under whose care he or she is (*b*). And where the defendant is in the legal possession of the premises which the plaintiff claims to recover the possession of, and the plaintiff cannot effect personal service on the defendant, and the premises are

(*t*) Ord. iii. r. 6 ; Ord. xx.
r. 1.

(*u*) Ord. ix. r. 2.

(*x*) *Goggs v. Huntingtower*, 12
M. & W. 503.

(*y*) Ord. ix. r. 15.

(*z*) Ord. ix. r. 3.

(*a*) Ord. ix. r. 4.

(*b*) Ord. ix. r. 5 ; *Fore Street*
Warehouse Co. v. Durrant,
10 Q. B. D. 471.

vacant, the service will be good, if a copy of the writ is posted upon the door of the premises (if a dwelling-house) or upon some other conspicuous part of the premises (if not a dwelling-house) (*c*). And as regards *partners*, where they are sued in the name of their firm, the writ is to be served upon a partner or partners personally, or else it is to be served, at the principal place (within the jurisdiction) of the partnership, upon some person having at the time the control or management of the business there (*d*). And as regards corporations aggregate (not being limited companies), the service is upon the manager, clerk, treasurer, or secretary (*e*) ; and in the case of hundreds, the service is on the high constable (*f*) ; and limited companies are served in the way appointed by statute (*g*),—that is to say, the writ is either to be left at the registered office of the company, or is to be sent by post to the registered office of the company in a prepaid letter addressed to the company (*h*).

Where personal service can be effected, but for some reason or other cannot be promptly effected, the plaintiff may obtain an order for substituted or other service, or for the substitution of notice for service (*i*),—which order will be obtained on an affidavit showing sufficient grounds for it (*k*), as that the defendant is in present communication with the proposed substitute, or (as the case may be) that the notice proposed to be given will come under the defendant's observation (*l*).

And assuming the action to be one within the jurisdiction of the court (*m*), if the plaintiff desires to serve the writ

(*c*) Ord. ix. r. 9.

(*d*) Ord. xlviii. r. 3.

(*e*) Ord. ix. r. 8.

(*f*) *Ibid.*

(*g*) *Ibid.*

(*h*) Companies Act, 1862, s. 62.

(*i*) Ord. ix. r. 2.

(*k*) Ord. x.

(*l*) *Ex parte Warburg, In re Whalley*, 24 Ch. Div. 364.

(*m*) *Bree v. Marescaux*, 7 Q.B.D.

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upon (or to give notice of it to) a defendant out of the jurisdiction, he must obtain an order giving him leave to do so,—which order will be obtained on an affidavit showing in what place or country the defendant is, and whether or not he is a British subject ; and showing also the *bonâ fide* nature of the plaintiff's claim in the action ; and showing also the ground on which he asks for the order (*n*). And by Order XI. rule 1, service out of the jurisdiction may be allowed in the following cases,—and in no others (*o*),—that is to say :—Firstly, when the whole action regards land within the jurisdiction ; Secondly, when the whole action regards the construction, rectification, specific performance, or rescission of some contract (or other document) relating to land within the jurisdiction, or is otherwise for the enforcement of some liability affecting such land ; Thirdly, where the defendant is domiciled or ordinarily resident within the jurisdiction ; Fourthly, where the action is for the administration of the estate of a deceased person whose domicile was English at the time of his death, or is for the execution of the trusts of some written instrument, and the execution is governed by the law of England, and relates to property within the jurisdiction, and the defendant is a trustee of the instrument ; Fifthly, where the action is for breach within the jurisdiction of any contract, wherever made, which, according to its terms, was to be performed within the jurisdiction ; Sixthly, where the action is for an injunction to operate within the jurisdiction ; or Seventhly, where the action is properly brought against some other person duly served within the jurisdiction, and the party to be served abroad is a necessary or proper party to the action. But as regards the fifth of these groups of cases, the service cannot be directed in Scotland or Ireland in any case,—although, as regards all the other groups, the

(*n*) Ord. xi.

(*o*) Ord. xi. r. 2 ; *Lenders v. Anderson*, 12 Q. B. D. 50.

question is simply one of convenience as regards service in either of these two countries.

At the time of first issuing the writ, or within twelve months thereafter, the plaintiff may issue one or more concurrent writ or writs, with a seal containing the word "Concurrent," impressed on each, such seal showing also the date when the concurrent writ was issued; and a concurrent writ is in force so long as the original writ is in force, and no longer (*p*); and as the original writ is in force for one year only (*q*), but may be kept in force for an indefinite time beyond the year by successive renewals thereof in manner to be presently explained, the concurrent writ may be correspondingly kept in force. A writ for service within the jurisdiction may be issued concurrently with one for service out of the jurisdiction, and *vice versâ* (*r*).

In case the defendant,—or, where there are co-defendants, any defendant,—shall not have been served with the writ (or concurrent writ), the plaintiff may apply before the expiration of the year for an order for the renewal of the writ (or concurrent writ); and such order will be obtained, upon summons at chambers, supported by an affidavit showing that reasonable efforts have been made to serve the defendant; and the renewal is for six months; but a second or other further renewal may be ordered in the like manner and upon the like grounds at any time during the currency of the last preceding renewal (*s*). The effect of renewing the writ (or concurrent writ) is to keep alive the action for all purposes,—and (among these) to prevent the statutes of limitation becoming a bar to the remedy (*t*).

(*p*) Ord. vi. r. 1.

(*q*) Ord. viii. r. 1.

(*r*) Ord. vi. r. 2.

(*s*) Ord. viii. r. 1.

(*t*) *Doyle v. Kaufman*, 3 Q. B. Div. 7, 340; *In re Manchester Economic Building Society*, 24 Ch. D. 488.

And as regards the *appearance* of the defendant to the writ of summons,—the defendant appears by leaving at the central office a memorandum which purports to authorize the proper officer to enter an appearance for him ; and the officer seals and delivers to the defendant a duplicate memorandum of appearance, and the defendant thereupon sends to the plaintiff (or to the plaintiff's solicitor) that duplicate, together with a written notice of his appearance (*u*). The memorandum of appearance must contain the defendant's solicitor's business address (or, if the defendant appears in person, the defendant's own residential address),—and in either case an address for service (*x*). Where the defendant is an infant, he enters his appearance to the writ by his guardian *ad litem*, the fitness of such guardian to act as such being verified by his solicitor's affidavit (*y*) ; and if an infant makes default of appearance, then the plaintiff, after the expiration of the time specified for appearance, gives six clear days' notice of his intention to apply to the court for the appointment of a guardian *ad litem* to such infant,—such notice being first served upon (or at the dwelling-house of) the person who is in charge of him when the writ is served, and being further served (when the infant is not in charge of his father or guardian) upon (or at the dwelling-house of) his father or guardian (if any) (*z*).

If the writ of summons is indorsed with a claim for the recovery of land, the landlord (although not a defendant) may, upon an affidavit of his actual or constructive possession, obtain an order giving him leave to appear (and defend) ; and thereupon he leaves his memorandum of appearance at the central office, and gives notice thereof to the plaintiff ; and after that, he is named as a defendant, and is treated as such in all the subsequent stages of the

(*u*) Ord. xii. r. 9.

(*x*) *Ibid.* rr. 10, 11.

(*y*) Ord. xvi. r. 18.

(*z*) Ord. xiii. r. 1.

action (*a*). And in his memorandum of appearance, he is required to state that he appears as landlord ; and he may also (if the fact is so) state, that he limits his defence to any (specified) part of the premises (*b*). And as regards partners sued in the name of their firm, they appear individually and in their own names (*c*),—a rule which applies to one individual trading under (and sued in) the firm name (*d*).

In case the memorandum of appearance contain no “address for service,” it will be rejected (*e*) ; and in case the address given as the residential address of the defendant is fictitious or illusory, the plaintiff may obtain an order setting it aside (*f*).

In lieu of appearing,—and without first appearing,—the defendant may apply to set aside the service of the writ upon him, and (for that purpose) to discharge the order (if any) which purports to authorize such service (*g*),—*e.g.*, when the provisions as to service out of the jurisdiction have been disregarded ; and a defendant may also,—in a proper case, that is to say, where he is a mere custodian of the subject matter in dispute,—issue an interpleader summons in lieu of appearing to the writ (*h*) ; also, where (in a suit against partners) anyone has been served as a partner, and he denies that he is a partner, he may (and should) enter a conditional appearance (*i*).

Supposing service to have been duly effected, then, for default of appearance to the writ (if there should be default), judgment may (in certain cases) be at once entered for the relief claimed by the indorsement of claim

(*a*) Ord. xii. rr. 25—27.

(*b*) *Ibid.* r. 28.

(*c*) Ord. xlviii*a*. r. 5.

(*d*) *Ibid.* r. 11.

(*e*) Ord. xii. r. 12.

(*f*) Ord. xii., r. 12.

(*g*) *Ibid.* r. 30.

(*h*) Ord. lvii. r. 4.

(*i*) Ord. xlviii*a*. r. 7.

on the writ,—that is to say:—if the writ is *specialy indorsed* under Order III., rule 6,—or if the indorsement, although not special, is for a liquidated demand,—the plaintiff on filing an affidavit of service, is entitled to sign final judgment (*k*) for any sum not exceeding the sum indorsed on the writ, together with interest (*l*) and costs; and where the claim is by a landlord for the recovery of the possession of land (the defendant being his own tenant, or a sub-tenant of such tenant), the judgment is for the recovery of such possession, with or without (according to the tenor of the indorsement of claim) mesne profits, arrears of rent, or damages for breach of contract (*m*). But all judgments for default of appearance will be set aside, upon terms,—at least, in general (*n*).

And where the claim indorsed on the writ is for the detention of goods and pecuniary damages, and the defendant fails to appear, then the plaintiff, on filing an affidavit of service or (as the case may be) of notice in lieu of service, may enter an interlocutory judgment in respect of his claim, and obtain a writ of inquiry to assess the damages, or an order that they be otherwise ascertained (*o*). And here we may conveniently notice, that in all cases of account (*e.g.*, a partnership, or executorship, or trust account), where the plaintiff in the first instance desires to have an account taken, he is to indorse the writ with a

(*k*) Ord. xiii. r. 3, grounded on the 15 & 16 Vict. c. 76, s. 27,—prior to which Act, until a defendant had *appeared*, no judgment in the action could be awarded; but the plaintiff caused an appearance to be entered for him (commonly known as an appearance *sec. stat.*, from its having been authorized by the 12 Geo. 1, c. 29).

(*l*) As to *interest* in such cases, see *Rodway v. Lucas*, 10 Exch.

665; *Paxton v. Baird*, [1893] 1 Q. B. 139.

(*m*) Ord. xiii. rr. 8, 9; *Danbuz v. Lavington*, 13 Q. B. D. 347; *Ardlen v. Boyce*, [1894] 1 Q. B. 796; *Southport Tramways v. Gandy*, [1897] 2 Q. B. 66.

(*n*) Ord. xiii. r. 10; *Watt v. Barnett*, 3 Q. B. D. 183, 363; *Burgoine v. Taylor*, 9 Ch. D. 1.

(*o*) Ord. xiii. r. 5.

claim that such account be taken,—and in that case, an order for the account may be forthwith obtained,—as well upon default of appearance, as also if there is no such default (*p*).

And even where the defendant has duly appeared to the writ,—the writ having been specially indorsed under Order III. rule 6,—the plaintiff may apply under Order XIV. rule 1, for an order giving him leave to sign final judgment; and where, upon any such application, leave is given to the defendant to defend whether conditionally or unconditionally, the judge who gives the leave is to give at the same time specific directions, as to the further conduct of the action,—that is to say, as regards pleadings, particulars, and admissions; discovery and interrogatories; inspection of property and of documents; and place and mode of trial,—equally as upon the *Summons for Directions* to be presently mentioned (*q*); and in particular he may order the action to be forthwith set down for trial, and to be put in the “*Short List*,” being a list of all the actions (ripe for trial) in which a prolonged trial appears not to be necessary (*r*); and this procedure is available in most commercial cases,—but, of course, it is not available when a jury is wanted.

In every action (including, in general, actions proceeding even in the Chancery Division), a general “*Summons for Directions*” (returnable in not less than four days) is to be issued (*s*),—either party being at liberty to issue it; and if the plaintiff does not, within fourteen days after the defendant’s appearance to the writ, issue this summons,—then (assuming that the plaintiff has not applied for judgment under Order XIV., in cases to which the Short Cause List, as

(*p*) Ord. iii. r. 8; Ord. xv.;
Bennett v. Bowen, 20 Ch. D. 538;
Davies v. Smith, 28 Ch. D. 650;
Blake v. Harvey, 9 Ch. D. 817.

(*q*) Ord. xiv. r. 8.

(*r*) *Ibid.*

(*s*) Ord. xxx. r. 1.

above explained, is applicable),—the defendant may apply to dismiss the action ; and on such latter application, the action will (in a proper case) be dismissed, but the application will more usually be simply treated as a summons for directions. And on the summons for directions, the court is to give (so far as it is possible then to give) all proper directions, as to the delivery of pleadings and particulars ; and as to the making of admissions, or as to discovery, interrogatories, inspection of documents, and inspection of property, and as to commissions and the examination of witnesses ; and as to the place and mode of trial ; and no affidavit is to be used in support of the summons, unless where the court requires it (*t*). Also, on the plaintiff's summons, the defendant may obtain any necessary directions, or even any ("*just and convenient*") interlocutory order ; and conversely, the plaintiff, on the defendant's summons (*u*).

Also, by the Rules of November, 1893, a plaintiff may indorse on the writ a notice of his intention to proceed to trial without pleadings ; and in that case, no pleadings are to be delivered, unless the judge shall (on the defendant's application) order them to be delivered (*x*) ; but when there is no such indorsement of the intention to proceed to trial without pleadings, or if the judge should (notwithstanding such indorsement) order pleadings to be delivered, the plaintiff in due course delivers his statement of claim, —and he must do so, if the defendant requires one, and he may do so, whether the defendant requires one or not (*y*).

Where several actions instituted by the same plaintiff or plaintiffs are pending in the same division of the court, and the question (or questions) in dispute are substantially the same in all the actions, the court will, upon the

(*t*) Ord. xxx. r. 3.

(*u*) *Ibid.* r. 4.

(*x*) Ord. xviii. r. 8.

(*y*) Ord. xx. rr. 1*b*, 1*d*

application of the divers defendants, and so soon as they have appeared, order the several actions to be consolidated (z) ; and in the consolidation order, the applicants jointly and severally undertake to abide by the verdict or judgment to be given in the consolidated action ; and, after the consolidation order, the plaintiff must proceed to verdict or judgment in the consolidated action ; and any of the parties may, after verdict and judgment, move for a new trial, or by way of appeal therefrom. Also, usually, where several actions by different plaintiffs are pending in the same division against the same defendant, the court will, in general,—*scil.*, where the question in dispute is substantially the same in all the actions,—select one of the actions as a *test action*, the divers plaintiffs agreeing to try that action first and to accept the result therein as decisive of all the actions ; and the trial of the other actions will meanwhile be directed to stand over (a).

Where a defendant is within the jurisdiction at the time the writ is issued, but he is suspected of an intention to go out of the jurisdiction before final judgment can be obtained in the action, the plaintiff may obtain an order for the arrest of the defendant, for a period not exceeding six months or until he has given security not to go out of the jurisdiction without the leave of the court (b) ; and this order may be obtained *ex parte*, at any time between the commencement of the action and the judgment,—the plaintiff showing, by affidavit, that he has a good cause of action to the amount of 50*l.* or upwards, that there is reasonable ground for his suspicion of the defendant's intention to go out of the jurisdiction, and that his (the defendant's) absence will materially prejudice the plaintiff

(z) Ord. xlix. r. 8.

(a) *Amos v. Chadwick*, 4 Ch. D. 869 ; 9 Ch. D. 459 ; and *Robinson v. Chadwick*, 7 Ch. D. 878.

(b) 32 & 33 Vict. c. 62, s. 6 ; Ord. lxix. r. 1 ; *Drover v. Beyer*, 13 Ch. D. 242 ; *Colverson v. Bloomfield*, 29 Ch. Div. 341.

in the prosecution of his action. And under the order so obtained, the sheriff of the county, in which the action is to be tried, arrests the defendant, and the defendant remains in custody for the time mentioned in the order, or until final judgment in the action (*c*),—or until the defendant shall, by bond (*d*), or otherwise, have given security to the plaintiff's satisfaction; and this proceeding is in lieu of the *special bail*, which used to be given upon a writ of *capias ad respondendum* according to the practice in use before the Judicature Acts (*e*), and which, in the Mayor's Court of London, was known by the name of *foreign attachment* (*f*).

II. THE PLEADINGS.—We are now arrived at the pleadings in an action; and before entering upon them, we will premise (as regards the *parties* to an action), that all persons may be joined as plaintiffs in whom any right to relief (*in respect of, or arising out of, the same transaction or series of transactions*) is alleged to exist, whether jointly, severally, or in the alternative,—*scil.*, where if there were separate actions (instead of one action) a common question of law or of fact, *material to the decision*, would arise (*g*),—the defendant being, however, entitled, in general, to his costs occasioned by any misjoinder (*h*); and the court may, at any stage of the proceedings, order any parties (plaintiffs or defendants) to be struck out or added (*i*); but a plaintiff may only be joined, if he consent. Also, infants sue by their next friends, and defend by their guardians

(*c*) *Hume v. Druyff*, Law Rep. 8 Exch. 214.

(*d*) *Betts v. Smyth*, 2 Q. B. 113.

(*e*) *Gibson v. Spalding*, 11 Mee. & W. 173; *Stein v. Valkenhuisen*, 1 Ell. Bl. & El. 65; *Levy v. Lovell*, 14 Ch. D. 234.

(*f*) *Mayor of London v. Joint Stock Bank*, 6 App. Ca. 393.

(*g*) Ord. xvi. r. 1 (1896); *Smurthwaite v. Hannay*, [1894] A. C. 494; *Carter v. Rigby*, [1896] 2 Q. B. 113; and *Stroud v. Lawson*, [1898] 2 Q. B. 44.

(*h*) Ord. xvi. r. 1.

(*i*) *Ibid.* r. 11.

ad litem (*k*) ; and lunatics so found sue by (and are sued by) their committees, both the lunatic and the committee being made co-plaintiffs or co-defendants (*l*). Married women used to sue by their next friends, and to be sued by themselves and their husbands ; but they now sue and are sued exactly like single women (*m*).

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), great alterations were introduced into the *pleadings* in an action,—the object of the reform being, to establish a method, built indeed on the old foundations, but with an improved design as regards simplicity and despatch (*n*) ; and under the Judicature Acts, the rules of pleading have been again remodelled ; but the general result (or object) of the pleadings is still the same, namely, to develop the point or points in controversy between the parties, that is to say, the issues (*o*) ; and when this result is attained, the parties are said to be *at issue*,—which issue may be either an *issue in law* or an *issue in fact*.

For the purpose of arriving at the issue, it is a rule of pleading, that the pleadings or mutual allegations shall always consist of matters of *fact*, and of fact only—for matters of *law* are judicially noticed by the courts. It is also a rule of pleading, that, in their allegations of fact, the pleaders are to abstain from any statement of the *evidence* by which the fact is to be established,—for matter of evidence is superfluous so far as the object of pleading is

(*k*) Ord. xvi. r. 16.

(*l*) *Ibid.* r. 17.

(*m*) *Ibid.* r. 16.

(*n*) From a period of very remote antiquity, down to 1852, the “pleadings” were of a highly artificial character ; and had been elaborated, during many successive centuries, into a regular system or science called *pleading*, or more

properly *special pleading* ; which was a system of high intrinsic value, developing the point in controversy, with the severest precision, and materially shortening the duration of the trial ; but it was carried to excess.

(*o*) *Thorp v. Holdsworth*, 3 Ch. D. 639 ; *Pierce v. Young*, 15 Ch. D. 475.

concerned,—which is merely to ascertain the question or issue,—to be determined hereafter, *i.e.*, at the hearing or trial (*p*). It is also a fundamental principle of pleading, that every allegation of fact in any pleading in an action, if not denied specifically or by necessary implication, or stated to be not admitted, in the next succeeding pleading of the opposite party, shall be taken (excepting as against infants or lunatics) to be admitted (*q*),—but where a reply or rejoinder merely joins issue, that is, in the general case, a sufficient general denial.

The first pleading is the *statement of claim* (*r*) ; which corresponds to the old *declaration* (in the Queen's Bench Division) and to the old *bill of complaint* (in the Chancery Division) ; and if the plaintiff proposes to have the action tried elsewhere than in Middlesex, he must name the county or place in which he proposes that the action shall be tried,—in which latter case, the action shall, unless a judge otherwise orders, be tried in the county or place so named (*s*). Under the practice formerly in use, the *venue* (that is, place for trial) in every *local* action must have been the county wherein the cause of action really arose,—although, in transitory actions, the plaintiff was allowed to lay the venue where he pleased, subject to the right of the defendant to apply to have it *changed* (*t*) ; but

(*p*) The rules of pleading under the Judicature Acts, direct that the court or a judge may, at any stage of the proceedings, strike out or amend anything scandalous, or which tends to prejudice, embarrass, or delay the fair trial of the action (Ord. xix. r. 27) ; and all such amendments are to be made as may be necessary, for the purpose of determining the real questions or question in controversy between the parties (Ord. xxviii. r. 1).

(*q*) Ord. xix. r. 13 ; *Tildesley v. Harper*, 13 Ch. D. 393.

(*r*) Ord. xix. r. 2.

(*s*) Ord. xxxvi. r. 1. When there is no statement of claim, a place of trial other than Middlesex may be specified in a written notice to that effect given by the defendant within six days after his appearance ; or the plaintiff may have specified it in his writ of summons.

(*t*) *Church v. Barnett*, Law Rep. 6 C. P. 116.

there is now no “local venue” for the trial of any action (*u*). The statement of claim alleges, in a narrative form, and in distinct and numbered paragraphs, and as briefly as is consistent with the nature of the case, the facts and circumstances upon which the plaintiff relies and under which his claim arises, and adds thereto a claim for the relief or remedy which is desired (*x*).

After the plaintiff has delivered his statement of claim, it is the defendant’s turn to consider in what manner it shall be encountered; and he is to address himself to this subject in the following manner:—If the statement of claim appears on the face of it substantially insufficient, in point of law, to entitle the plaintiff to what he claims,—in other words, if it does not show any cause of action—the defendant used to *demur* (*y*),—that is, used to deliver a written formula, called a *demurrer* (from *demorari*), importing that he denied such sufficiency on some ground therein stated (*z*); but as from the 24th October, 1883, demurrers (*eo nomine*) have been abolished; and it is now provided, that (in lieu of demurring) the defendant shall

(*u*) Ord. xxxvi. r. 1.

(*x*) Some forms of statements of claim in actions, and the appropriate subsequent pleadings, are given in Appendices (C), (D), and (E), Orders and Rules of 1883. The actions selected as specimens comprise those for “an account stated”; “on a bill of exchange”; “for false imprisonment”; “for negligence”; “for trespass to land”; and others,—including some which are in respect of actions (as, for example, “of foreclosure,” or “for administration of an estate,”) belonging to the other divisions of the High Court.

(*y*) *Metropolitan Railway Company v. Defries*, 2 Q. B. D. 389.

(*z*) Prior to the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), a demurrer was either *general* or *special*; that is, it either objected in general terms only, or it set forth some particular objection; and, by 27 Eliz. c. 5 and 4 & 5 Ann. c. 3, all objections of *mere form* were required to be raised by way of special, and not of general, demurrer; but under 15 & 16 Vict. c. 76, s. 51, no pleading was to be deemed insufficient for any defect which could theretofore have only been objected to by special demurrer.

(by motion or otherwise in a summary way) raise the question of the sufficiency in law of the pleading (*a*). If, on the other hand, the statement of claim appears *ex facie* to show a good cause of action, then the defendant's course is to *state his defence*,—the general object of which is to make answer, in point of *fact*, to the statement of claim (*b*) ; and if he states no defence, within the time allowed by the practice of the court for that purpose, the plaintiff will be entitled either to enter judgment against him (*c*), or to apply to the court to give such judgment as he may be entitled to on his statement of claim, according to the nature of his claim (*d*).

The defence might formerly have been either dilatory or peremptory,—a dilatory defence having been one founded on some matter of fact unconnected with the merits of the case, and a peremptory defence having been one founded on the merits. Dilatory defences were either (1) Pleas *to the jurisdiction*,—showing that, by reason of some matter therein stated, the case was not within the jurisdiction of the court ; or (2) Pleas of *suspension*,—showing some matter of temporary incapacity to proceed with the suit,—the effect of such a defence (if established) being to defeat the particular action but to leave the plaintiff at liberty to commence another (*e*). There might also, formerly, have been,—but there may not now be (*f*),—a defence or plea *in abatement* of the action,—one of the usual grounds for

(*a*) Ord. xxv. rr. 1, 4; *Burstall v. Beyfus*, 26 Ch. Div. 35.

(*b*) Ord. xix. r. 2.

(*c*) Ord. xxvii. rr. 2, 4, 6, 7, 8, 9.

(*d*) Ord. xxvii. r. 11.

(*e*) Under the Judicature Acts, an action is not abated, by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue ; and does not become

defective, by the assignment, creation, or devolution of any estate or title *pendente lite* ; but the “successor in interest” may be ordered to be made a party to the action ; and the action is then continued by or against him, or is otherwise disposed of as may be just. (Ord. xvii. rr. 1—4.)

(*f*) Ord. xxi. r. 20.

such a defence having been the non-joinder of a co-contractor.

The defences to an action on the *merits* are, of course, various. For, firstly, they may consist of a *denial* of that which is alleged by the plaintiff in his statement of claim ; and (under the system of pleading in use before the Judicature Acts) defences by way of denial might have been by way of general denial, raising (what used to be called) the “general issue,”—as, for example, in trespass or trespass on the case, that the defendant “*was not guilty*” ; in debt on bond, that “*it was not his deed*” ; in certain other cases of debt, that the defendant “*never was indebted as alleged*” ; and in assumpsit, that he “*did not promise as alleged*.” By the present rules of pleading, however, it is not sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim ; but each allegation of fact, of which the truth is not admitted, must be dealt with specifically (*g*),—the general issue “*not guilty by statute*” being, however, preserved (*h*).

Again, secondly, defences on the merits may be either in *justification* or *in discharge* ; and a defence by way of justification (or excuse) was where, *e.g.*, in an action for assault and battery, the defendant pleaded *son assault demesne* ; or where, in an action for slander, the defendant pleaded that the words spoken were true,—a defence in justification showing that (in effect) there *never* was any right of action ; but a defence by way of discharge always showed the cause of action to have been once existing, and merely alleged that it had been barred by matter subsequent,—as by payment, or release ; or by accord and satisfaction ; or by *set-off* ; or by the statutes of limitation.

Or, thirdly, the defendant may plead by way of *counter-claim* ; that is to say, he may allege that he (the defendant)

(*g*) Ord. xix. r. 17.

(*h*) *Edwards v. Hodges*, 15 C. B. 477.

has a claim against the plaintiff, for which he might bring his action ; and under the Judicature Acts, it is provided, that a defendant may set off or,—by way of counterclaim,—set up any right or claim, whether legal or equitable, and whether sounding in damages or not, which he may have against the plaintiff ; and such set-off or counterclaim is to have the same effect as a statement of claim in a cross action,—so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross claim ; and where the set-off or counterclaim of the defendant is established, the court may, if the balance be in defendant's favour, give him judgment for that amount, or may otherwise adjudge to the defendant such relief as he may, on the merits of the case, be entitled to (*i*).

With respect to all defences on the merits,—they either *traverse* (that is, deny) the matters of fact alleged in the plaintiff's statement of claim, or else *confess and avoid* them (that is, while admitting them to be true, they at the same time show some new matter of fact which obviates the legal effect of them). For example, in an action for an assault and battery, the defence may consist of a denial (*i.e.*, *traverse*) of the assault alleged ; or it may be to the effect, that the defendant was first assaulted by the plaintiff, and merely defended himself (*son assault demesne*),—admitting (or confessing) the act of violence on the part of the defendant, but *avoiding* the legal liability by showing circumstances of excuse or justification (*k*).

There are also certain anomalous defences ; *e.g.*, in an action for a debt or liquidated demand, the defendant may avail himself of the defence of *tender*,—that is, he may plead, that he has been always ready to pay the demand, and that

(*i*) Ord. xix. r. 3 ; xxi. r. 11 ; (*k*) Ord. xix. r. 27.
36 & 37 Vict. c. 66, s. 24.

before the commencement of the action he tendered it to the plaintiff, and now brings it into court ready to be paid to him. And in any action brought to recover a debt or damages, the defendant may plead *payment into court*, as that he brings a certain sum of money into court, ready to be paid to the plaintiff, and that it is enough to satisfy the plaintiff's claim (*l*). A defendant may also, in a proper case, raise the defence of *estoppel*, as that the plaintiff ought not to be permitted to make a certain allegation, because he has formerly done some solemn act involving an assertion to the contrary (*m*). And as regards all these defences, it is evident, that they are in the nature of exceptions to the general classification above stated; for in the two first (admitting, as they do, the right of action), there is a confession, without avoidance; and in the last, there is neither traverse, confession, nor avoidance (*n*).

The statement of defence being delivered, it is then to

(*l*) Ord. xxii. ; *Greaves v. Fleming*, 4 Q. B. D. 226 ; *Buckton v. Higgs*, 4 Exch. D. 174 ; *Hawkesley v. Bradshaw*, 5 Q. B. D. 302 ; *Heatley v. Newton*, 19 Ch. D. 326.

(*m*) The most usual estoppel is by *deed* ; and there are, besides, two other species of estoppel, namely :—estoppel by *record*, and estoppel by matter *in pais*,—the first obtaining where any fact is alleged in a court of record, or any judgment is given therein ; and the second obtaining where the act is done out of court (*Wilkinson v. Blades*, [1896] 2 Ch. 788 ; Plowd. 434 ; Co. Litt. 260, 352 a ; *Pargeter v. Harris*, 7 Q. B. 708 ; *De Mora v. Concha*, 29 Ch. Div. 268).

(*n*) Prior to the Common Law

Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 64), it was a rule in pleading, that the defendant could not plead *specially* such matter as amounted in effect to the general issue, but he must have pleaded the general issue in terms,—it being, at that time, essential to the nature of a special (or affirmative) plea, that the matter of it should be such as to give *colour* to the plaintiff's claim, and a plea which gave no colour was required to be by way of traverse. This rule, however, might be evaded, by *expressly* giving colour to the plaintiff,—colour thus *expressly* given curing the want of implied colour, which would otherwise have vitiated the plea.

be encountered by the plaintiff ; and he is put to the same alternative as the defendant was with regard to the statement of claim,—that is to say, he must either proceed as by way of *demurrer* thereto, for substantial insufficiency of the defence in point of law or equity ; or he must *reply* by pleading some matter of fact. If the plaintiff replies, he must, in general, within three weeks deliver his reply to the defendant (*o*),—which reply may be either a traverse or a plea in confession and avoidance, or both (*p*) ; or the plaintiff may reply by way of *estoppel*. Or, instead of replying, the plaintiff may (by way of *new assignment* or otherwise) (*q*), amend his statement of claim ; and he may do so, without any order for the purpose, provided he do it before replying (*r*). And to the whole of this series of pleadings applies the general rule, that neither party may (except by way of amendment) depart from or vary the claim or defence which he has once insisted on,—for such a *departure*, or inconsistent pleading, might occasion endless altercation ; and therefore the reply must support the statement of claim, without raising any new ground of claim ; nor may the defendant, in his rejoinder, allege any fact inconsistent with his defence (*s*),—and every such inconsistency or departure, if really substantial, would be a ground for striking out the pleading as embarrassing (*t*).

(*o*) Ord. xxiii. r. 1.

(*p*) *Hall v. Eve*, 4 Ch. D. 341.

(*q*) Ord. xxiii. r. 6.

(*r*) Ord. xxvii. r. 13 ; Ord. xxiii. r. 4. In the present rule of pleading, no pleadings beyond the reply are mentioned by any distinctive name ; but under the former system, there was recognized a *rejoinder* on the part of the defendant to the replication ; a *sur-rejoinder* from the plaintiff ; a

rebutter by the defendant ; and a *surrebutter* on the part of the plaintiff ; but if there happened to be pleadings beyond these (a very unusual case), they were not distinguished by any separate denominations.

(*s*) Ord. xix. r. 16 ; *Bartlett v. Wells*, 1 B. & Smith, 836 ; *Brine v. Great Western Railway Company*, 2 B. & Smith, 402.

(*t*) Ord. xix. r. 16.

The rejoinder, if any, to the reply must be delivered within four days (*u*),—whereupon the pleadings are deemed to be closed (*x*); and, in fact, no pleading, *except* a joinder of issue, may be pleaded subsequent to reply, unless by leave of the court, and upon terms (*y*). Moreover, a reply (when it would be, as it usually is, a mere joinder of issue) need not be delivered at all (*z*).

It may, however, happen, that even after the pleadings are closed,—or before the close of the pleadings,—some new matter may arise, affording a defence to the action upon the merits (*a*),—as that the plaintiff has, since the commencement of the action, given the defendant a release; and in such cases, the defendant (or the plaintiff, if such matter arise in respect of a counterclaim) may (by leave) deliver a further defence or (as the case may be) a further reply, setting forth the new matter (*b*); and in case the opposite party shall admit the sufficiency of the further defence or further reply, he may do so (by delivering a confession thereof); and he is (in that case) entitled, in general, to sign judgment for the costs of the action previously incurred (*c*); and a judgment so signed is like the old judgment by *confession* or judgment in *cognovit actionem* (*d*).

With a view to clearness of statement, we have hitherto supposed that the plaintiff's statement of claim comprises only a single claim, and that the defendant pleads only a

(*u*) Ord. xxiii. r. 3.

(*x*) Ord. xxiii. r. 5; Ord. xxvii. r. 13.

(*y*) Ord. xxiii. r. 2.

(*z*) Ord. xxvii. r. 13.

(*a*) Formerly, such a defence was known as a plea *puis darrein continuance*, being so named

because pleaded since the last adjournment of the court,—such adjournments having been formerly called *continuances*. (*Beddall v. Maitland*, 17 Ch. D. 174.)

(*b*) Ord. xxiv. rr. 1, 2.

(*c*) *Ibid.* r. 3.

(*d*) Arch. Pr. 13th ed., p. 540.

single defence ; but the plaintiff may have occasion to bring forward several distinct claims,—and if so, he may join them together (cumulatively) in one statement of claim (*e*); and although (at the time when the Judicature Acts came into operation), this liberty was confined to claims in the same right and between the same parties, the plaintiff may now (since these Acts) unite, in the same action and in the same statement, several causes of action,—subject only to this, that (unless by leave) no cause of action may be joined with an ejectment, except claims for mesne profits or for arrears of rent in respect of the premises or the like (*f*) ; and (unless by leave) a trustee in bankruptcy may not join claims in his official with claims in his individual capacity (*g*),—and subject also to this, that if it appear to the court that any of the claims cannot be conveniently tried together, separate trials thereof may be ordered (*h*). So, also, the defendant may, on his side, desire to bring forward several distinct matters of defence ; and he may do so,—provided he do not thereby embarrass the plaintiff (*i*). It used also to be competent to the defendant to demur to part of the statement of claim, and to put in a defence to the other part,—or (after obtaining leave from the court or a judge) to demur and plead to the same matter ; and he may apparently still proceed as by way of demurrer, and (at the same time or afterwards) put in his defence or (as the case may be) his rejoinder,—provided he first obtain leave to do so ; and the plaintiff may exercise similar rights on his part. It is obvious, therefore, that the pleadings will not always lead to the production of a *single* issue only, but will often lead to the production of *several* issues ; and where the pleadings

(*e*) Such cumulative statements used to be called *counts*.

(*f*) Ord. xviii. r. 2 ; 15 & 16 Vict. c. 76, s. 41 ; *Davies v. Davies*, 1 H. & C. 451.

(*g*) Ord. xviii. r. 3.

(*h*) *Ibid.* r. 1.

(*i*) *Spurr v. Hall*, 2 Q. B. D. 615 ; *Berdan v. Greenwood*, 3 Ex. D. 251.

do not (in the opinion of the judge) sufficiently disclose the issues of fact in dispute between the parties, he may direct them to *prepare issues*, to be settled by himself (*k*).

Where the issue raised upon the pleadings was an issue in *law*, a *demurrer-book* used to be made up, containing so much of the pleadings as were required to show the points for argument, and the demurrer was then *entered* for argument; but now no demurrer-book is made up, and the point of law is simply argued on the pleadings,—on a day for that purpose appointed, or on the hearing of the demurrer-motion (*l*); but a *special case* may also be stated for the purpose (*m*).

And as regards special cases (raising issues of *law* for the decision of the court),—the parties may (if so disposed) concur in stating a special case; and this they may do immediately after writ issued (*n*), the defendant first appearing, of course: Also, at any time before or at the trial, if it appear to the court, that there is a preliminary question of law to be decided and that the proof of facts is a matter subordinate thereto, the court may order the question of law to be decided on a special case sufficiently raising it, and in the meantime the proof of facts is stayed (*o*).

As regards the plea of payment into court,—a defence which is available (under Order XXII. rule 1) in any action which is brought to recover a debt or damages,—Firstly, if the payment into court is made before delivering defence, the defendant must serve the plaintiff with a notice of the payment in, and the notice is to specify the claim in respect of which the money is paid in (*p*); and Secondly, if the

(*k*) Ord. xxxiii. r. 1; *Piercy v. Young*, 15 Ch. D. 475.

(*l*) *Johnston v. Johnston*, 32 W. R. 1016; 33 W. R. 329.

(*m*) Ord. xxxiv; Ord. xxv. r. 3;

Johnasson v. Bonhote, 2 Ch. D. 298.

(*n*) Ord. xxxiv. r. 1.

(*o*) *Ibid.* r. 2.

(*p*) Ord. xxii. r. 4.

payment into court is made at the time of delivering the defence, the defendant must (in his defence) signify the fact of payment in, specifying also the claim in respect of which the money is paid in (*q*),—and so, in the case of a tender before action (*r*). The money paid in will be paid out to the plaintiff on his request (*s*),—that is to say, in the following cases:—(1) Where the payment in has been made before defence; or (2) Where the payment in has been made at the time of delivering the defence, and there is no denial of liability in the defence; or (3) Where the payment in has been made at the time of delivering the defence, and there is an allegation in the defence of tender before action. Apparently, also, even where there is a denial of liability in the defence, the plaintiff may accept in satisfaction of his claim the money paid in (*t*),—although he may also refuse to do so, and thereafter he will proceed (at his own peril) with the action (*u*). The plea of payment into court is also available by way of defence to a counterclaim (*x*).

The time for delivering statement of claim is, in general, six weeks after the defendant's appearance to the writ (*y*); and the time for delivering statement of defence is, in general, ten days after the statement of claim was delivered (*z*); and the time for delivering the plaintiff's reply (if any) is, in general, three weeks after the statement of defence was delivered (*a*); and the time for delivering a rejoinder (if any) is, in general, four days after the reply was delivered (*b*); but when a writ is specially indorsed (under Order III. rule 6), the indorsement of claim thereon is the only statement of claim (*c*).

(*q*) Ord. xxii. r. 2.

(*r*) *Ibid.* r. 3.

(*s*) *Ibid.* r. 5.

(*t*) *Ibid.* r. 6.

(*u*) *Ibid.* r. 6.

(*x*) *Ibid.* r. 9.

(*y*) Ord. xxii. r. 1.

(*z*) Ord. xxi. rr. 6. 7.

(*a*) Ord. xxiii. rr. 1, 4.

(*b*) *Ibid.* r. 3.

(*c*) Ord. xx. r. 1; *Fawcus v.*

Charlton, 10 Q. B. D. 576.

And as regards the general character of the pleadings, it is required (by the rules made under the Judicature Acts) that they shall be as brief as the nature of the case will admit (*d*) ; and the prescribed forms are to be used where applicable, but not in a slavish way. Every statement of claim (and also every counterclaim) is to state specifically the relief wanted, but need not also ask for general relief (*e*) ; and separate and distinct facts,—made the basis of separate and distinct claims,—are to be kept separate in each (*f*) ; also, every defence to a statement of claim and every reply to a counterclaim is to deal specifically with every allegation of fact that is not admitted, a mere general denial not being sufficient (*g*),—except as regards damages (*h*), and except that (as already mentioned) a simple joinder of issue operates as a general denial ; and denials of fact are to be substantial and not evasive,—denials *modo et formâ* (if standing alone) being deemed evasive (*i*). Where a contract is alleged, a bare denial thereof shall operate to deny the fact only, and not to put in issue the invalidity thereof on any ground of law (Order XIX. rule 20) ; and where the action is for a debt or liquidated demand, the defendant may not deny the debt, but must deny some matter of fact (*k*).

And as regards particular pleas, it is provided as follows :—Possession is a good plea, without adding title (*l*),—unless where the title is equitable only, or the defence is on equitable grounds : “ Not guilty by statute ” is a good plea (*m*),—but (except by leave) it cannot be joined with any other plea : All such special defences as rest upon the statutes of limitations (*n*),—except in relation

(*d*) Ord. xix. r. 2.

(*e*) Ord. xx. r. 6.

(*f*) *Ibid.* r. 7.

(*g*) Ord. xix. r. 13.

(*h*) *Ibid.* r. 17.

(*i*) *Ibid.* r. 19.

(*k*) Ord. xxi. rr. 1, 2, 3.

(*l*) *Ibid.* r. 21.

(*m*) Ord. xix. r. 12 ; Ord. xxi
r. 19.

(*n*) Ord. xix. r. 15.

to land (*o*) ; and all special defences that rest on the Statute of Frauds (*p*) ; and all releases (*q*) and the like (*r*),—are to be specially pleaded : Also, fraud must be pleaded with great preciseness, particulars of the alleged fraud being stated in the pleadings or else separately supplied (*s*) ; and the alleged waiver of,—or (as the case may be) the breach or non-performance of,—any condition precedent must be specifically alleged (*t*).

The plaintiff may, before the delivery of the defendant's defence, or at any time before replying thereto, wholly discontinue his action by delivering to the defendant a notice of discontinuance (*u*) ; and he may (by leave) do the like at any subsequent stage of the action (*v*) ; but the leave to discontinue is not granted as a matter of course (*y*). The discontinuance does not, in general, prejudice any subsequent action (*z*) ; and the counterclaim (if any) may still be proceeded with (*a*). The plaintiff is, in each case, to pay to the defendant the costs of the action (*b*),—and for such costs (unless paid within four days after taxation) the defendant may sign judgment (*c*). Also, in lieu of discontinuing the whole action, the plaintiff may withdraw part only of the cause of action, doing so without leave before the defendant has delivered his statement of defence, or at any time before reply if a statement of defence has been delivered (*d*), but doing so only with leave and upon terms at any subsequent stage of the action ; and the plaintiff in either case pays the defendant's costs of the

(*o*) *Davkins v. Penrhyn*, 4 App. Ca. 51.

(*p*) Ord. xix. r. 15.

(*q*) *Ibid.*

(*r*) *Catling v. King*, 5 Ch.D. 660.

(*s*) Ord. xix. rr. 6, 7.

(*t*) *Ibid.* r. 14.

(*u*) Ord. xxvi. r. 1.

(*x*) Ord. xxvi. r. 1.

(*y*) 4 Q. B. D. 217.

(*z*) Ord. xxvi. r. 1 ; *The Kronprinz*, 12 App. Ca. 256.

(*a*) Ord. xxi. r. 16.

(*b*) Ord. xxvi. r. 1.

(*c*) *Ibid.* r. 3.

(*d*) *Ibid.* r. 1.

matter withdrawn (*e*); and for such costs (unless paid within four days after taxation), the defendant may sign judgment (*f*).

Should the plaintiff fail to deliver (when bound to deliver) a statement of claim, the defendant may have judgment dismissing the action (*g*); and on the other hand, if the defendant should fail to deliver his statement of defence, the plaintiff may (in certain cases) have such judgment as he is entitled to on his statement of claim (*h*); and in other cases, he may (according to what he claims in the action) have judgment for the recovery of the possession of the land (*i*), with or without mesne profits and damages (*k*); or judgment for the value of the goods detained, with or without pecuniary damages (*l*); or judgment for pecuniary damages (*m*); or judgment for the amount of the debt or of the liquidated damages, whether the writ is specially indorsed or not (*n*). However, all judgments obtained by default may (and usually will) be set aside upon terms (*o*).

When the writ is specially indorsed (under Order III. rule 6),—and the defendant appears,—the plaintiff may (and usually will) obtain judgment at once under Order XIV. rule 1, if he show (by affidavit) the truth of his claim, and state (in the affidavit) that in his belief there is no defence to the action; but the defendant may (in such a case) obtain leave to put in a statement of defence to the action (*p*), and such leave may be unconditional, but is usually upon terms (*q*).

(*e*) Ord. xxvi. r. 1.

(*f*) *Ibid.* r. 3.

(*g*) Ord. xxvii. r. 1.

(*h*) *Ibid.* r. 11.

(*i*) *Ibid.* r. 7.

(*k*) *Ibid.* r. 8.

(*l*) Ord. xxvii. r. 4.

(*m*) *Ibid.*

(*n*) *Ibid.* r. 2.

(*o*) *Ibid.* r. 15.

(*p*) Ord. xiv. rr. 1, 3.

(*q*) *Ibid.* r. 6.

III. THE TRIAL AND EVIDENCE.—If the pleadings ultimately leave for trial an issue (or issues) of fact, it then becomes necessary to determine, on which side the truth of the fact lies ; and for this purpose, there is the *Trial*, when the *evidence* is gone into ; and the trial may be either before a judge and jury ; or before a judge ; or before an official or special referee (*r*).

1. Trial *before a Judge and Jury*.—Trial by jury (called also trial *per pais*, or by the country) is a form of trial that hath been used time out of mind in this country (*s*). And, firstly, there is a trial *at bar*, that is, a trial by jury before two (or more) of the judges sitting in

(*r*) Ord. xxxvi. rr. 2—6. There are (or were) also the following four other kinds of trial in civil cases,—(1) Trial *by record*,—where some matter of record (as a judgment) is alleged by one party, and the other pleads *nul tiel record*,—the point being decided by the party alleging the existence of the record bringing it into court ; (2) Trial by *inspection* or *examination*,—where the question (being evidently the object of sense) is decided by the judges themselves on the testimony of their own senses ; (3) Trial *by certificate*,—where the evidence of the person certifying is (by custom or otherwise) the only proper criterion of the point in dispute ; and (4) Trial *by witnesses* (*per testes*),—where, as in the civil law, the judge is left to form his decision upon the credit he gives to the witnesses without the intervention of a jury.

(*s*) Blackstone (vol. iii. p. 349) considers trial by jury as having been “ universally established “ among all the northern

“ nations” ; and he says, that it is mentioned in England as early as in the laws of Ethelred (for which he cites Wilk. Ll. Anglo-Sax. 117), but that its first establishment among us is unknown. But it is exceedingly doubtful, whether trial by jury did actually exist among us at any time before the Norman Conquest (Hallam, Mid. Ag. vol. ii. p. 396, 7th ed. ; Hist. Eng. Law by Reeves, vol. i. pp. 24, 83) ; and most probably, we owe the germ of this, (as of so many other of our institutions,) to the Normans. In the time of Henry the Third, trial by jury had taken among us, (in substance,) the shape which it now wears ; but its rudiments appear as early as the reign of Henry the Second ; and indeed the particular species of it, called the *grand assize*, which was appropriate to the trial of questions of *mere right*, appears to have been established by a positive law of the last-mentioned monarch (Glanv. l. 2, ch. 7).

banc ; but this form of trial is comparatively rare, and takes place only in causes of great difficulty, or where the crown is concerned in interest, and insists on its right to have the cause so tried,—for as between private parties, this mode of trial is allowed, only by special permission of the court (*t*). The more usual form of trial by jury is that which takes place either before a judge at the sittings in Middlesex (*u*), or before a judge or commissioner of assize upon circuit (*x*).

When therefore an issue or issues in fact have been joined, *notice of trial* must be given by one or other of the parties before the action can proceed further ; and with regard to this, it has been provided, that the plaintiff may, with his reply, or at any time after the *close of the pleadings*, give such notice,—specifying therein one of the modes of trial already mentioned (*y*) ; and if, for a period of six weeks from the close of the pleadings, he fails so to do, the defendant may do so himself (*z*) ; and the notice of trial,

(*t*) 11 Geo. 4 & 1 Will. 4, c. 70, s. 7 ; *Dimes v. Lord Cottenham*, 1 L. M. & P. 318 ; Ord. xxxvi. r. 9 ; *Dixon v. Farrer*, 18 Q. B. D. 43.

(*u*) By Order in Council (22nd May, 1883), all London actions were directed to be tried in Middlesex simply ; and although, by the 54 & 55 Vict. c. 14, the sittings in London for the trial of London jury cases were revived, these cases are again tried in Middlesex simply.

(*x*) Upon judgment by default, in an action for unliquidated damages, the amount of damages is usually *assessed* by a jury under a *writ of inquiry*,—and the assessment is usually before the under-sheriff (or in London before one of the sheriff's *secondaries*).

(*y*) Ord. xxxvi. rr. 2, 6. It is to be noticed, that either party may insist on matters of fact being tried before a jury, when the action is for slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage (Ord. xxxvi. r. 2) ; but that, in other actions in the Queen's Bench Division, the action is now usually tried without a jury,—subject always to the control of the judge, who may, by special order, direct the mode of trial (Ord. xxxvi. rr. 5, 6).

(*z*) Ord. xxxvi. r. 12. A trial thus brought on by the defendant used, at one time, to be called a *trial by proviso* ; as to which see 3 Bl. Com. 357.

by whichever party given, is a ten days' notice,—unless the opposite party consents to “short” notice, being four days' notice (*a*). And the next step is to *enter the cause for trial*, a copy of the whole of the pleadings in the action being at the same time delivered to the proper officer—which copy so delivered constitutes (what used to be called) the *Nisi Prius Record*.

The jury to try the issue (or issues) of fact raised by the pleadings, is constituted as follows, that is to say :—a precept is issued, directing the sheriff to summon a sufficient number of jurors for the trial of all issues (whether civil or criminal), which shall come on for trial at the next assizes, or (as the case may be) at the next sittings of the court ; and a printed panel (or slip of parchment) containing the names of the jurors summoned in obedience to such precept, is made out by the sheriffs, and kept open for public inspection,—the panel containing the names, abodes, and additions of a number of jurors (not being less than forty-eight nor exceeding seventy-two) taken from the *jurors' book* ; which book, by the County Juries Act, 1825 (6 Geo. IV. c. 50) as amended by the Juries Act, 1870 (33 & 34 Vict. c. 77), is annually made out in each county, from lists returned (from each parish), by the churchwardens and overseers, of persons therein qualified to serve as jurors, and who are not *exempted* from so serving (*b*). But inasmuch as it is in the option, either of plaintiff or defendant, to have the action tried by a *special jury*,—that is to say, a jury consisting of persons who (being on the jurors' book) are of a certain station in society, such as esquires, bankers, merchants, and the

(*a*) Ord. xxxvi. rr. 14, 30. Where the trial is under Ord. xviii. (*i.e.*, without pleading), the notice of trial is required to be a twenty-one days' notice.

(*b*) As to these *exemptions*, see 33 & 34 Vict. c. 77, s. 9 ; and 36 & 37 Vict. c. 66, s. 77.

like (c),—therefore, and in order to provide for the causes which are to be tried by special jury (d), the sheriff is further directed to summon a sufficient number of special jurymen,—a printed panel of the special jurors so summoned being kept in the sheriff's office for public inspection,—and the mode of obtaining a special jury is now the same, both in *town* causes and in *country* causes. Formerly, however, as regards town causes (or causes to be tried at the Middlesex sittings), the practice was somewhat different,—for where any such cause was to be tried by a special jury, due notice thereof was given, and recourse was thereupon had (by the sheriff) to the *special jurors' list*,—a list annually made out of persons qualified to act as special jurors (e); and tickets corresponding with the names of the jurors on this list being put into a box and shaken, the officer took out forty-eight (f),—to any of which names either party might object for incapacity, and (supposing the objection to be established) another name was substituted,—and these forty-eight names having at a subsequent period been reduced to twenty-four, by striking off such as each party should in his turn wish to be removed, the twenty-four were accordingly summoned, and their names were placed upon a panel (g); and this method was commonly described as *striking* a special jury (h). But, by the Juries Act, 1870 (33 & 34 Vict. c. 77), it has been enacted, that it shall for the future be resorted to only in compliance with the order of the court or a judge (i).

(c) See 33 & 34 Vict. c. 77, s. 6; *Vickery v. London, Brighton, &c. Rail. Co.*, Law Rep. 5 C. P. 165.

(d) No special jury need, however, be summoned by the sheriff, unless he has received notice to do so from one of the parties; and the fact of being marked as a special juror, is no exemption from

the liability to serve on common juries.

(e) 6 Geo. 4, c. 50, s. 31.

(f) 15 & 16 Vict. c. 76, s. 110; and (as to the number forty-eight) 61 & 62 Vict. c. 27.

(g) 15 & 16 Vict. c. 76, s. 110.

(h) 6 Geo. 4, c. 50, s. 32.

(i) 33 & 34 Vict. c. 77, ss. 16—18.

Let us now suppose the action to be called on in court, both parties appearing (*k*) :—The pleadings as delivered are handed to the judge to peruse ; and in the meantime, the jury is being *called* and *sworn*. Now the calling of the jury consists in successively drawing out of a box, into which they have been previously put, the names of the jurors on the jury panel, and calling them over in the order in which they are so drawn (*l*) ; and the twelve persons whose names are first called, and who appear, are sworn as the jury,—excepting that, where before the trial, an order has been obtained, directing that a *view* shall be had, by certain of the jurors on the panel, of the messuages or lands in question, the six or more jurors (agreed on by the parties or else nominated by the sheriff) who have viewed the premises, are first sworn (*m*).

After the jurors have appeared, and before they are sworn, they are liable to be *challenged* by either party,—such challenges being of two sorts, either (1) to the *array*, or (2) to the *polls*. And, Firstly, a challenge to the array is to the whole panel ; and it may be on account of some default in the officer who arrayed the panel,—as if he be himself a party to the suit, or related (by blood or affinity) to either of the parties ; also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination or under the direction of either party, this

(*k*) If, at the trial, the plaintiff appears, but not the defendant, the plaintiff may prove his claim so far as the burthen of proof lies on him, and then ask for judgment (Ord. xxxvi. r. 31) ; and on the other hand, if the defendant appears, but not the plaintiff, the defendant may ask for judgment dismissing the action (*ibid.* r. 32).

(*l*) 6 Geo. 4, c. 50, s. 26 ; 15 & 16 Vict. c. 76, ss. 108, 110 ; 33 & 34 Vict. c. 77, s. 16.

(*m*) The Judicature Acts have provided, that a *view* of the property may be had,—either by the judge himself (Ord. l. r. 4) ; or by the jury (Ord. l. r. 5) ; or by the parties (Ord. l. r. 3) ; or by the official referee (Ord. xxxvi. r. 48).

is a good cause of challenge to the array (*n*). And, again, a challenge to the array may be either by way of *principal* challenge, or by way of challenge *to the favour*,—the former being on one of the direct grounds above described; the latter, on grounds that imply only a probability of bias or partiality,—one example instanced in the books being where the son of the sheriff had married the daughter of the adverse party (*o*); and there seems to be this practical difference between them, that the first, if sustained in point of fact, must be allowed as of course, while the allowance of the latter is matter of judgment and discretion only (*p*). If the challenge be controverted by the opposite party, it is to be left to the determination of two *triors* appointed by the court (*q*); and if these decide in favour of the objection, the array is quashed, and a new jury impanelled by the coroner (*r*),—who in this, as in some other instances, acts as a substitute for

(*n*) Formerly, the array might have been challenged for want of *hundredors*,—an objection founded on the early practice of our law, by which the jurors, in the origin of the institution of trial by jury, were summoned altogether *de vicineto*, and were indeed in the nature of *witnesses*, rather than of judges; but the necessity for hundredors has been abolished (4 & 5 Anne, c. 3; 6 Geo. 4, c. 50, s. 13). The array might also formerly have been challenged, if an *alien* were party to the proceedings, and if (on the fact being duly noticed) the sheriff did not return a jury *de medietate linguæ*,—that is, a jury one half of which consisted of aliens, supposing so many to be found in the place; but this jury *de medietate* was done away with (in civil actions) by the

6 Geo. 4, c. 50, ss. 3, 47; and (in other cases) by the 33 & 34 Vict. c. 14, s. 5.

(*o*) Co. Litt. 156 a.

(*p*) *Ibid.*; 3 Bl. Com. 363.

(*q*) A principal challenge may be tried by the court itself without the intervention of triors (*Mayor of Carmarthen v. Evans*, 10 Mee. & W. 274).

(*r*) *Newman v. Edmonds*, 1 Bulst. 114; 2 Hale, P. C. 275; *R. v. Edmonds*, 4 B. & Ald. 471. If any exception be taken to the coroner, the jury is to be arrayed by two persons named by the court and sworn to the discharge of their duty,—which two persons are called *elisors* or electors; and no challenge is allowed to their array. (3 Bl. Com. 355; Fortesc. de Laud. LL. ch 25; Co. Litt. 158.)

the sheriff, where exception on any ground is taken to the latter.

Secondly, challenges to the polls (*capita*, *i.e.*, individuals) are exceptions taken to particular jurors; and such challenges are on four accounts,—*propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum* (*s*):—

(1.) *Propter honoris respectum*,—*e.g.*, if a lord of parliament be impanelled on a jury, he may be challenged by either party,—just as he may excuse himself, as exempted by law (*t*).

(2.) *Propter defectum*,—*e.g.*, if a jurymen be an alien born, and neither domiciled in this country nor naturalized, this is defect of birth and ground for challenge (*u*). And we may here notice also the defect of sex—no female being capable of serving on a jury (*x*),—and the defect of age, every juror requiring to be between twenty-one and sixty years of age. But the principal deficiency is defect of estate,—the qualification of an ordinary (or common) juror in respect of estate,—and which now depends on the County Juries Act, 1825 (6 Geo. IV. c. 50),—being that he must have, within the county in which he resides and in which the action is to be tried,—in his own name, or in trust for him,—10*l.* by the year, above reprises, in lands or tenements of freehold, copyhold, or customary tenure, in fee simple, fee tail, or for the life of himself or some other person; or else 20*l.* by the year, above reprises, in lands or tenements, held by lease for twenty-one years or longer, or for a term of years

(*s*) Co. Litt. 156 b.

(*t*) 6 Geo. 4, c. 50, s. 2; 33 & 34 Vict. c. 77, *in sched.*

(*u*) 6 Geo. 4, c. 50, s. 3; *R. v. Sutton*, 8 B. & C. 417.

(*x*) Except, of course, in the case of a jury of matrons, upon the writ *de ventre inspiciendo*. (6 Geo. 4, c. 50, s. 1; *post*, vol. iv. bk. vi. chap. xxi.)

determinable on any life or lives ; or else he must be a householder, rated or assessed to the poor rate,—or to the inhabited house duty,—in Middlesex, on a value of not less than 30*l.*, or (in any other county) on a value of not less than 20*l.*,—and if he does not possess one or other of these qualifications, it is a ground of challenge (*y*) ; but as regards towns corporate and counties corporate having a jurisdiction of their own, and also as regards London, the Act provides a somewhat different qualification (*z*).

(3.) *Propter affectum*,—*i.e.*, for suspicion of bias or partiality ; and the challenge on this ground may be either a *principal* challenge or a challenge *to the favour*,—a *principal* challenge alleging that the juror is of kin, to either party, within the ninth degree (*a*) ; or that he has been arbitrator on either side ; or that he has an interest in the cause (*b*) ; or that there is an action depending between him and the party ; or that he has taken money for his verdict ; or that he has formerly been a juror in the same cause ; or that he is the master, servant, counsellor, steward, or solicitor of the opposite party, or belongs to the same society or corporation (*c*),—but a challenge to the *favour* merely suggests an objection or probable suspicion founded on (*e.g.*) acquaintance with the parties (*d*) ; and these challenges are determined (like challenges to the array) by *triors* (*e*).

(4.) *Propter delictum*,—that is to say, for conviction of some crime or misdemeanor,—as for treason, felony, or

(*y*) 6 Geo. 4, c. 50, ss. 1, 27.

(*z*) *Ibid.* s. 50.

(*a*) *Onions v. Nash*, 7 Price, 263 ;
Hewitt v. Ferneley, *ib.* 234.

(*b*) *Bailey v. Macaulay*, 13 Q. B. 829.

(*c*) *Williams v. Great Western Railway Company*, 3 H. & N. 869.

(*d*) Finch, L. 401.

(*e*) Co. Litt. 158. It is said, that a principal challenge to the polls may, like a principal challenge to the array, be tried by the court, without the intervention of triors. (Arch. Pr. by Chitty, 13th ed. p. 393.)

any infamous crime,—unless the juror shall have obtained a free pardon (*f*).

If a sufficient number of jurors do not appear, or if (by means of challenges or exemptions) a sufficient number of unexceptionable ones do not remain, either party might pray a *tales* (*i.e.*, so many more as were wanted, *tales quales*) ; and for this purpose, a writ of *decem tales*, *octo tales*, and the like, used (at the common law) to issue to the sheriff (*g*) ; but, by the 6 Geo. IV. c. 50, s. 37, the judge, trying the cause, is empowered, at the request of either party to award a *tales de circumstantibus* (*h*). However, in the case of common jurors,—of whom seventy-two are usually returned on the same common jury panel,—it happens, of course, but rarely, that the whole are exhausted so as to make a *tales* necessary ; and in the case of special jurors, the deficiency is to be made up (in the first place) from the common jury panel, if a sufficient number can be found,—and if not, then by a *tales de circumstantibus* (*i*).

The necessary number of twelve qualified persons being at length obtained, they are then separately sworn (if Christians) on the New Testament, and otherwise according to their own religious belief,—or they affirm instead of being sworn (*k*),—“well and truly to try the issue between the parties, and a true verdict to give according to the evidence.”

The jury being now ready to hear the cause, *the pleadings are opened*, and the counsel for the plaintiff (*l*),—

(*f*) 6 Geo. 4, c. 50, s. 3 ; 33 & 34 Vict. c. 77, s. 10.

(*g*) 3 Bl. Com. 365.

(*h*) F. N. B. 166.

(*i*) *Gatliff v. Bourne*, 2 M. & Rob. 100 ; *British Museum v. White*, 3 Car. & P. 289.

(*k*) 1 & 2 Vict. c. 105 ; 30 &

31 Vict. c. 35 ; 51 & 52 Vict. c. 46.

(*l*) In all actions for *unliquidated damages*, the plaintiff, however, shall begin,—though the affirmative of the issue should be on the defendant. (*Mercer v. Whall*, 5 Q. B. 447 ; *Cooper v. Wakley*, Moo. & M. 248.)

or (in certain cases) counsel for the defendant, when the burden of proving the issue is on the defendant (*m*),—makes his opening statement ; and in his opening statement, he briefly informs the jury what has been transacted in the action, up to that stage of its prosecution ; explains the parties, the kind of action, the statement of claim which has been made by the plaintiff, the defence which has been set up, and the other pleadings,—showing upon what point or points issues of fact have been joined, which are to be by them determined ; and he then proceeds to explain to the jury the nature of the case he proposes to establish, and the evidence intended to be produced in its support ; and then the evidence itself is produced. And when this has been done, the counsel on the other side opens the adverse case ; and supports it, if its nature so require, by evidence,—which he is also entitled to sum up ; and then the party which began is heard by way of reply ; but no reply is allowed, (save only in the case of the crown,) unless evidence has been given in answer to the case first stated (*n*).

And as regards the *Evidence* at the trial,—that is, in general, *oral* evidence ; but there may, of course, (according to the nature of the action) be written evidence as well,—such as deeds, records, and the like. And with respect to witnesses, there is a process to bring them in, by writ of *subpœna ad testificandum* (*o*) ; which commands them

(*m*) *Calder v. Rutherford*, 3 Brod. & Bing. 302 ; *Evans v. Birch*, 3 Camp. 10 ; *Williams v. East India Company*, 3 East, 192.

(*n*) The 17 & 18 Vict. c. 125, s. 18, has provided, that the party who begins, or his counsel, shall be allowed (in the event of his opponent not announcing at the close of the plaintiff's case his intention to adduce evidence) to address the

jury a second time at the close of such case, for the purpose of summing up the evidence he has adduced ; and the party on the other side, or his counsel, shall be allowed to open his case, and also to sum up his evidence (if any).

(*o*) 17 & 18 Vict. c. 34 ; *O'Flanagan v. Geoghegan*, 16 C. B. (N.S.) 636.

(laying aside all excuses, and on pain of forfeiting 100*l.*) to appear at the trial, and give their evidence; and such writ may contain also a clause of *duces tecum*,—requiring them to bring, at the same time, all such deeds or writings, in their possession or power, as the party who issues the subpœna may think material for this purpose; and in the event of the non-attendance of the witness so subpœnaed, and his inability to show any lawful ground of excuse, (such as that of dangerous illness,) he is considered as having committed a contempt of court, and is liable to an attachment (*p*); and an action will also lie against him, at suit of the party damnified by his absence (*q*),—but no witness is bound to appear in court, unless his reasonable expenses for the whole period of his attendance, *eundo, morando, et redeundo*, are tendered him; nor if he there appears, is he bound to give evidence, till such charges are actually paid him; and he is also protected, during the same period, from any arrest for debt (*r*).

If it be ascertained beforehand (*s*), that a witness required at the trial will be unable to attend, by reason of permanent sickness or infirmity, or through his absence in parts beyond the jurisdiction, the court is empowered, by the 1 Will. IV. c. 22, to issue a commission for his examination (*t*); and the evidence so taken on commission may, in general, be afterwards used at the trial,—*scil.*, if the witness be then dead, or if he continues ill and infirm, or absent beyond the jurisdiction (*u*),—but otherwise, the

(*p*) *Chapman v. Davis*, 1 Dowl. (N.S.) 239: Ord. xxxvii. r. 8; *Connell v. Baker*, 29 Ch. Div. 711.

(*q*) *Davis v. Lovell*, 1 Horn. & Hurl. 451; *Couling v. Coxe*, 6 D. & L. 399.

(*r*) *Meekins v. Smith*, 1 H. Bl. 636.

(*s*) *Mondel v. Steele*, 8 Mee. & W. 300; *Finnery v. Beasley*, 17 Q. B. 86.

(*t*) If the place where the examination is to be had is in any of the colonies or foreign dominions of the crown, the commission is addressed to a court or judge there. (22 Vict. c. 20; *Campbell v. Att.-Gen.*, Law Rep. 2 Ch. App. 571.)

(*u*) Ord. xxxvii. r. 5; *Duke of Beaufort v. Crawshaw*, Law Rep. 1 C. P. 699.

deposition cannot in general be used, without the consent of the party against whom it is offered (*x*). Also, any particular fact or facts may (for sufficient reasons) be ordered to be proved by affidavit; and, in such a case, the affidavit will be read at the trial on such conditions as may then appear reasonable. Also, any witness whose attendance in court ought (for any sufficient cause) to be dispensed with, may be examined before a commissioner or examiner—unless the court or judge shall be satisfied that the other party *bonâ fide* desires the witness to be produced in court, for the purpose of cross-examining him, and also that he can be produced (*y*); and where necessary for the purposes of justice, any person may be ordered to be examined upon oath, and his deposition filed and given in evidence, on such terms (if any) as shall be directed (*z*).

Also, either party to the action may,—at a convenient time before the trial (*a*),—administer *interrogatories* to the other, and the other party *answers* by affidavit; but the leave of the court is in all cases required for the delivery of interrogatories (*b*); and security for the costs of the answer thereto must be given (*c*). But the judge (or master) has, on the application at chambers of the opposite party, power to set aside or strike out interrogatories, if he thinks them unreasonably or vexatiously exhibited, or that they are scandalous (*d*); and he may also determine, whether the interrogatories are or are not put *bonâ fide* for the purpose of the action, and whether the matter inquired after is sufficiently material at that stage of

(*x*) 1 Will. 4, c. 22, s. 10. In lieu of a commission to examine witnesses, a *request* to that effect may be made. (Ord. xxxvii. r. 6A, App. K., Nos. 37A and 37B.)

(*y*) Ord. xxxvii. r. 1.

(*z*) *Ibid.* r. 5.

(*a*) *Mercier v. Cotton*, 1 Q. B. D. 442; *Hancock v. Guérin*, 4 Exch. D. 3.

(*b*) Ord. xxxi. r. 1.

(*c*) *Ibid.* rr. 25, 26, 27.

(*d*) *Ibid.* r. 7.

the action, or as to any other objection to them taken in the affidavit in answer (*e*) ; and now (under the rules of November, 1893), the particular interrogatories which it is proposed to deliver are submitted to the court or judge, when the application is made for leave to deliver them, and it is competent (and usual) for the court or judge to then and there determine, whether or not the interrogatories are necessary for fairly disposing of the trial (*f*). and to settle the interrogatories accordingly.

All witnesses, that have the use of their reason, are to be received and examined,—but not, of course, children too young to understand the nature of an oath; or adults who, through disease or from any other cause, are incapable (*g*). At one time, no *party* to the action was allowed to give evidence ; and persons *interested* in the testimony they were to give,—however slight that interest might be (*h*),—were also incompetent to be heard, as witnesses on the side of the question to which their interest inclined ; and persons who were *infamous*,—that is, of such a character that they might be challenged as jurors *propter delictum* (*i*),—were wholly inadmissible as witnesses ; but the objection in all these cases now affects only the *credibility*, and not the *competency*, of the witness. For, by the 6 & 7 Vict. c. 85, no person offered as a witness is to be excluded, on the ground of incapacity from interest (or from crime) (*k*) ; and, by the 14 & 15 Vict. c. 99, the *parties* themselves are, in general, both competent and compellable to give evidence,—though not to answer questions tending to criminate themselves (*l*) ; and, by the 16 & 17 Vict. c. 83, the wife (or husband) of any

(*e*) Ord. xxxi. rr. 6, 20.

(*f*) *Ibid.* r. 2.

(*g*) 1 Stark. Ev. 81.

(*h*) *Doe v. Bramwell*, 3 Q. B. 307.

(*i*) 3 Bl. Com. 370.

(*k*) *Udal v. Walton*, 14 Mee. & W. 254 ; *Att.-Gen. v. Hitchcock*, 1 Exch. 91.

(*l*) *The Queen v. Payne*, Law Rep. 1 C. C. 349 ; *Reg. v. Slater*, 8 Q. B. D. 267.

party is, in this respect, in the same position,—subject only to this, that neither of them can be compelled to disclose anything which he (or she) has learned by communication from the other during the marriage. Also, by the 32 & 33 Vict. c. 68, the parties to any action for *breach of promise of marriage*, or to any proceeding *instituted in consequence of adultery*, were made competent to give evidence therein (*m*); and, by the 40 & 41 Vict. c. 14, on the trial of any proceeding (whether by indictment or otherwise) instituted for the purpose of trying or enforcing a *civil* right only, the defendant himself (or the wife or husband of such defendant) is an admissible witness, and is compellable to give evidence. There remained, however, still in force, one exception to the general rule: viz., that no one should be *sworn* who professed not to believe in the existence of a God by whom perjury was punished; but the 32 & 33 Vict. c. 68 provided, that if any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, should object to take an oath, or should be objected to as incompetent to take an oath,—such person should, if the presiding judge was satisfied that the taking of an oath would have no *binding effect on his conscience*, make a solemn promise and declaration that his evidence should be true; and that if he should, nevertheless, wilfully and corruptly give false evidence, he might be convicted of perjury; and now, the Oaths Act, 1888 (*n*), sect. 1, has provided generally, that every person, when objecting to be sworn, and stating as the ground of such objection, either that he has no religious belief or that the taking of an oath is contrary to his religious belief, may make a solemn affirmation instead of taking the oath, in all places, and for all purposes, subject to the like

(*m*) *In re Ridout's Trusts*, Law Rep. 10 Eq. Ca. 41; *Bishop of Norwich v. Pearse*, *ib.* 2 Ad. &

Eccl. Cas. 289; *M. v. D.*, 10 Prob. Div. 175.

(*n*) 51 & 52 Vict. c. 46.

liability to be prosecuted for perjury as in the case of falsely swearing.

The oath of a witness (or his affirmation in lieu thereof), is to speak “the truth, the whole truth, and nothing but the truth”; and the oath is, in general, taken upon the New Testament, or (in the case of persons who do not profess the Christian faith, the oath is administered in such form as is appropriate to their own creed (if any) (*o*); and, now, under the Oaths Act, 1888 (*p*), sect. 5, anyone desiring to do so may swear with uplifted hand.

A witness is not bound to answer any question which tends to expose him to any penalty (*q*) or forfeiture (*r*); but he cannot refuse to answer a question relevant to the matter in issue, merely on the ground that his answer may tend to establish a *debt* or other *civil* liability against him (*s*).

A counsel or solicitor is not bound (or even at liberty) to divulge the secrets of the cause with which he has been entrusted (*t*); nor can official persons be called upon to disclose any matter of state, the publication of which might be prejudicial to the community (*u*); and no questions are permitted to be asked which tend to the discovery of the

(*o*) *Omichund v. Barker*, 1 Atk. 49; *The Queen v. Whitehead*, Law Rep. 1 C. C. R. 33.

(*p*) 51 & 52 Vict. c. 46. See also 52 & 53 Vict. c. 10 (the Commissioners for Oaths Act, 1889), consolidating and amending the law as to officers (usually solicitors) before whom oaths may be taken, or affirmations made,—which last mentioned Act has since been amended by the 53 & 54 Vict. c. 7, and 54 & 55 Vict. c. 50.

(*q*) 14 & 15 Vict. c. 99, s. 3;

Bradlaugh v. Edwards, 11 C. B. (N.S.) 377; *The Queen v. Boyes*, 1 B. & Smith, 324.

(*r*) *Fisher v. Ronalds*, 12 C. B. 762; *Atherley v. Harvey*, 2 Q. B. D. 524; *Allhusen v. Labouchere*, 3 Q. B. D. 654.

(*s*) 46 Geo. 3, c. 37.

(*t*) *Reg. v. Duchess of Kingston*, 11 St. Tr. 246; *Weeks v. Argent*, 16 Mee. & W. 817; *Reg. v. Cox*, 14 Q. B. D. 153.

(*u*) *Beatson v. Skene*, 5 H. & N. 832.

channels through which information has been given to the officers of justice in criminal prosecutions (*x*). But, with these exceptions, the law compels all professional persons (whether physicians, surgeons, divines, or others), to divulge facts (if relevant to the issue) with which they have become professionally acquainted ; and will not allow such persons,—or even a servant or private friend,—to withhold a relevant matter, though of the most delicate nature, and communicated to him or her in the strictest confidence (*y*).

A party producing a witness is not (even though in the opinion of the judge he shall prove to be adverse) allowed to impeach his credit by general evidence of bad character, —although he may (in such a case) contradict him by other evidence ; and (by leave of the judge) he may prove that the witness has made, at some other time, a statement inconsistent with his present testimony ; but to protect the witness, in such a case, against unfair surprise, it is necessary, before such latter proof be given, that the circumstances of the supposed former statement, so far as is sufficient to designate the particular occasion, shall be mentioned to him (*z*).

One witness, if credible, is *sufficient* evidence of any single fact,—though undoubtedly the concurrence of two or more corroborates the proof (*a*) ; and our law considers, that there are many transactions to which only one person is privy, and therefore does not, as a rule, demand the testimony of two, as the civil law universally required,—

(*x*) *Hardy's Case*, 44 St. Tr. 816 ;
Attorney-General v. Briant, 15
Mee. & W. 169.

(*y*) *Wilson v. Rastall*, 4 T. R.
753 ; *Valliant v. Dodemead*, 2 Atk.
524.

(*z*) 17 & 18 Vict. c. 125, s. 22 ;
Greenhough v. Eccles, 5 C. B.
(N.S.) 786.

(*a*) *Hill v. Wilson*, L. R. 8
Ch. App. 888 ; *Shillito v. Hobson*,
30 Ch. D. 396.

“ *Unius responsio testis omnino non audiatur* ” (b). However, in certain cases, corroborative testimony is required,—either by the common law (c) or by the express provision of the statute law (d).

After the examination of the witness by the party for whom he is called,—and which is termed his *examination in chief*,—he is subject to *cross-examination* by the opposite party,—which being concluded, he may then be *re-examined* by the party calling him, *with reference to any matter arising out of the cross-examination* (e). And upon his cross-examination, the witness may be asked, if he has not given a contrary account of the same matter on a former occasion,—and if he does not distinctly admit this, proof may then be given, *aliunde*, that he has done so (f); but if it is intended to contradict him by his former statement in *writing*, his attention must first be called to those parts of the writing which are to be used for the purpose of contradiction (g). Also, although the witness cannot be cross-examined as to particular acts of misconduct,—for that would be to engraft another trial upon the trial which is before the jury (h),—yet he may be

(b) Cod. 4, 20, 9. Blackstone (vol. iii. p. 370) remarks upon this rule as followed by modern civilians:—“As they do not allow a less number than two witnesses to be *plena probatio*, they call the testimony of one, though never so clear and positive, *semiplena probatio* only, on which no sentence can be founded. To make up therefore the necessary complement of witnesses, when they have one only to a single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf, and administer to him what is called

“the *suppletory* oath,—and if his evidence happens to be in his own favour, this immediately converts the half proof into a whole one.”

(c) *Finch v. Finch*, 23 Ch. D. 267.

(d) 32 & 33 Vict. c. 68.

(e) *Prince v. Samo*, 7 A. & E. 627.

(f) 17 & 18 Vict. c. 125, s. 23.

(g) Sect. 24; 28 & 29 Vict. c. 18, ss. 4, 5.

(h) *Queen's Case*, 2 Brod. & Bing. 299; *Carpenter v. Wall*, 11 A. & E. 803.

questioned as to whether he has not been convicted of any felony or misdemeanor; and if he denies the fact or refuses to answer, the conviction may be proved (*i*),—that being usually done by producing a certificate of the conviction. Moreover, the credit of the witness may be impeached, not only by means of cross-examination, by proving previous contradictory statements, and by evidence reflecting on his general bad character, but also by calling witnesses to disprove (or rebut) such of the facts stated by him as are material to the issue (*k*).

No evidence is necessary, as to any matters of which the court takes judicial notice (*l*); or as to matters which the law presumes (*m*); or with respect to matters which the opposite party has at any time admitted to be true (*n*), or which are admitted on the pleadings (*o*); and evidence is, of course, always dispensed with, as to matters upon which an admission has been made for the express purpose of being used at the trial. And with reference to this latter subject, the Judicature Acts provide, that either party may give notice that he admits the truth of the whole or any part of the case of the opposite party (*p*); and either party may call on the opposite party to admit any *document*, saving all just exceptions; and in case of refusal or neglect to admit, the costs of proving the document are to be paid by the party so called upon and refusing, whatever may be the result of the action,—unless the court certifies, that the refusal to admit was reasonable; and, on the other hand,

(*i*) 17 & 18 Vict. c. 125, s. 25.

(*k*) Taylor on Evidence, s. 1329.

(*l*) 8 & 9 Vict. c. 113; 14 & 15 Vict. c. 99, ss. 7—14; c. 100, s. 22.

(*m*) 1 Bl. Com. 457; *Goodright v. Saul*, 4 T. R. 251, 356; *Saye and Sele Peerage*, 1 H. of L. Cases,

509; *Hargrave v. Hargrave*, 9 Beav. 552.

(*n*) See *Rex v. Gardner*, 2 Camp. 513; *Rex v. Topham*, 4 T. R. 126; *Brickett v. Hulse*, 7 Ad. & E. 454.

(*o*) *Smith v. Martin*, 9 Mee. & W. 304; *Harris v. Gamble*, 7 Ch. D. 877.

(*p*) Ord. xxxii. r. 1.

no costs of proving any document will, in general, be allowed to the party who neglects to give the usual notice to admit (*q*). Also, either party may call on the other to admit (for the purposes of the trial only) any specified *facts*, with or without qualifications ; and, in case of his refusal or neglect to make the admission, he will in general have to bear the costs of proving the facts which he has refused to admit (*r*). Also, as regards any documents which are referred to in the pleadings of either of the parties, the other party may give him a written *notice to produce* the same for inspection and perusal, and to permit a copy to be taken thereof on pain of not being allowed at the trial to put such document in evidence (*s*) ; and either party may apply for an *order for the production of* any document in the possession or power of the other party relating to any matter in question in the action (*t*).

No evidence is, of course, admissible except upon the point in issue (*u*),—*e.g.*, in an action of debt, where the defendant denies his bond, and alleges that it is not his deed, and the issue is whether it be his deed or no,—he cannot give in evidence a release of the bond ; for that does not destroy the bond, but shows only that it is discharged ; and therefore does not support the issue, which is that the bond is not his deed ; and he should have pleaded the release, in order to have made such evidence admissible.

Also, none but the best evidence shall be adduced (*x*),—that which is of a secondary kind not being substituted for that which is of a primary kind, where the primary evidence is accessible ; *e.g.*, the contents of a *private* deed

(*q*) Ord. xxxii. r. 2.

(*r*) *Ibid.* r. 4.

(*s*) Ord. xxxi. r. 15 ; *Quilter v. Heatley*, 23 Ch. Div. 42.

(*t*) Ord. xxxi. r. 14.

(*u*) B. N. P. 298 ; *Hey v. Moorhouse*, 6 Bing. N. C. 52.

(*x*) 3 Bl. Com. 368 ; *Taylor on Evidence*, pp. 340—368, 2nd edit.

or writing,—as distinguished from a record or other public document (*y*),—cannot be proved by a copy (still less by mere oral evidence), *if the writing be in existence, and can be procured by the party by whom the proof is offered*,—but the writing itself must be produced (*z*). And if, as regards any private document, there be occasion to prove its execution by a witness,—a proof which is in general required, unless the document is thirty years old, and comes out of the proper custody (*a*),—the proof is by calling the attesting witness (*b*),—or, if there are several attesting witnesses, by calling one of them; or else, by proving that such attesting witnesses are dead, or otherwise incapable of giving evidence (*c*), and then adducing secondary evidence of the execution, as by proof of their handwriting (*d*),—which latter proof may even be given by an expert, upon a *comparison* of the signature in question with any admitted handwriting (*e*). And this rule was formerly of so strict a nature, that even the admission of the party against whom the instrument was produced, that it was executed by him, (unless such admission were made for the express purpose of the trial,) would not have sufficed to excuse the absence of the attesting witness (*f*); but now, by the 17 & 18 Vict. c. 125, s. 26, it is unnecessary to prove by the *attesting witness*, any instrument to the validity of which attestation is not required by law,—so that such instrument may now be proved by admission or otherwise, as if there had been no attesting witness thereto. Also, by the express provisions of particular

(*y*) 14 & 15 Vict. c. 99, s. 7.

(*z*) *M'Gahey v. Alston*, 2 Mee. & W. 206; *Jones v. Tarleton*, 9 Mee. & W. 675; *Howard v. Smith*, 3 Man. & Gr. 254; *Queen v. Llan-faethly*, 2 Ell. & Bl. 940.

(*a*) B. N. P. 255; 2 Phill. on Ev. 203; *Doe d. Neale v. Samples*, 8 A. & E. 151.

(*b*) *Gillott v. Abbott*, 7 A. & E. 783.

(*c*) *Adams v. Kerr*, 1 B. & P. 360.

(*d*) *Nelson v. Whittall*, 1 B. & Ald. 19.

(*e*) 17 & 18 Vict. c. 125, s. 27.

(*f*) *R. v. Harringworth*, 4 M. & S. 354.

statutes, certified extracts of certain *private* documents (*e.g.*, extracts under the Bankers' Books Evidence Act, 1879) (*g*), are made admissible in evidence ; and documents of a *public* character may be proved by the Queen's printer's copies thereof (*h*), or by copies thereof purporting to be printed under the superintendence of Her Majesty's Stationery Office (*i*).

Where the circumstances are such as to entitle either party to give secondary evidence, then (*there being no degrees of secondary evidence*) he is at liberty to resort to any species of secondary evidence within his power (*k*) ; *e.g.*, he may give *oral* evidence of the contents of a document, and he is not bound to produce a *copy*, though in fact he should have one (*l*).

HEARSAY,—that is to say, the statement by a witness of what has been said or declared out of court by a person not a party to the suit,—is not admissible as evidence,—for our law deems it unsafe to rely upon the assertions of any one, unless he be called as a witness in the cause, and deliver his testimony under the sanction of an oath, and under the check which the power of cross-examination imposes (*m*) ; and this rule is so absolute, that the death of the person by whom the fact was so asserted out of court (and the consequent impossibility of producing him as a witness) makes

(*g*) 42 & 43 Vict. c. 11.

(*h*) Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), amended by the 45 & 46 Vict. c. 9, and 58 & 59 Vict. c. 9.

(*i*) Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9) ; and see (as to entries in parish books) *Taylor v. Devey*, 7 A. & E. 409 ; and (as to ancient manorial surveys) *Bridgman v. Jennings*, 1 Ld. Raym. 734 ; and (as to a charity treasurer's books) *Doe v.*

Hawkins, 2 Q. B. 212) ; and (as to judgments) *Christy v. Tancred*, 9 Mee. & W. 438 ; and (as to public books, not judicial) *Jewison v. Dyson*, 9 Mee & W. 540, and *Rowe v. Brenton*, 8 B. & C. 743.

(*k*) *Doe v. Ross*, 7 Mee & W. 192.

(*l*) *Brown v. Woodman*, 6 Car. & P. 206, *per* Parke.

(*m*) *Wright v. Doe*, 7 A. & E. 384 ; *Stobart v. Dryden*, 1 Mee. & W. 615.

no difference ; and upon the same principle, no written entry or memorandum, made by a person not a party to the suit, can in general be admitted as evidence, even after his death. But in particular cases (or under particular circumstances), hearsay is admissible evidence. For, firstly, the declaration of a third person may form part of the *res gestæ*, or may otherwise derive particular credibility from the circumstances under which it was made,—*e.g.*, if a question arises, whether a third person committed an act of bankruptcy by absenting himself from his house, his own declaration made at the time, that he so absented himself to avoid a creditor, is good evidence (*n*). Also the books of stewards (or other receivers), though strangers to the suit, are admitted in evidence after their death,—*so far as the entries therein tend to charge them with the receipt of moneys*,—because such acknowledgments, having been made against their own interest, are entitled, on that ground, to particular weight (*o*). And declarations or statements in the nature of hearsay are admitted, where evidence of that description happens to constitute the natural and appropriate means of proof,—as upon questions of pedigree ; or of custom, public boundary, and the like (*p*). Also, a statement made by a third person will, usually, be receivable as evidence against the plaintiff or defendant in the cause, if the plaintiff or defendant be proved to have been present when the statement was made, and to have heard its import,—for it then becomes material to consider whether, by his language or demeanour on the occasion, it appeared to receive his assent (*q*).

Having said thus much on the *admissibility* of the

(*n*) 1 Stark. Ev. 48.

(*o*) *Higham v. Ridgeway*, 10 East, 109 ; *Fursdon v. Clogg*, 10 Mee. & W. 574 ; *Taylor v. Witham*, 3 Ch. D. 605.

(*p*) *Davies v. Lowndes*, 5 Bing.

N. C. 161 ; *Glenister v. Harding*, 29 Ch. Div. 985 ; *Haines v. Guthrie*, 13 Q. B. D. 818.

(*q*) 1 Stark. Ev. 50.

evidence at the trial, we are now to consider the *effect* or *weight* of the evidence. Now the evidence may be either *positive* or *circumstantial*,—by the former of which, we commonly understand a proof of the very fact in question ; and by the latter, a proof of circumstances from which (according to the ordinary course of human affairs) the existence of the fact may reasonably be *presumed*. And the strength of circumstantial or presumptive evidence varies, according to the nature and particular combination of the facts proved ; for it may either be barely sufficient to decide the question,—supposing no evidence to be offered to the contrary ; or it may be so strong as to prevail even against the evidence offered on the other side, or so violent as not to admit of being repelled by any contrary evidence whatever. Presumptions of *fact* are of this class ; but certain presumptions of fact are presumptions of *law* also,—and in this latter case, there are certain accepted rules of law regarding them (*r*).

When the evidence is completed on both sides, the judge sums up,—recapitulating in greater or less detail (as he may deem necessary) the statements of the witnesses, and the contents of the documents adduced on either side, and commenting upon the manner in which they severally bear upon the issue, and giving his direction upon any matter of law that may arise, but leaving the jury to determine

(*r*) For example, the presumption of life (*Nepean v. Knight*, 2 Mee. & W. 894 ; *Rhodes v. Rhodes*, 35 Ch. Div. 586) ; or of *seisin in fee* (*Jayne v. Price*, 5 Taunt. 326 ; *Doe v. Williams*, 2 Mee. & W. 749) ; or of death *without issue* (*Doe v. Woolley*, 8 B. & C. 22 ; *Earl of Roscommon's Case*, 6 Clark & Fin. 97) ; or of a *reconveyance* (*Fenney v. Jones*, 3 M. & Scott, 472 ; *Doe v. Williams*,

1 Mee. & W. 749) ; or of *unity of possession* (*Clayton v. Corby*, 2 Gale & D. 174) ; or of *authority as agent* (*Owen v. Barrow*, 1 N. R. 101 ; *Ward v. Evans*, Salk. 442) ; or of *payment* (*Welch v. Seaborn*, 1 Stark. Rep. 474 ; *Oswald v. Legh*, 1 T. R. 270 ; *R. v. Stephens*, 1 Burr. 434 ; *Egg v. Barnett*, 3 Esp. 196) ; or of *due stamping* (*Doe v. Coombs*, 3 Q. B. 687).

for themselves the credit and weight to which they are respectively entitled, and to decide whether, upon the whole, the preponderance of proof is in favour of the plaintiff or the defendant (*s*). And the jury, after this summing up, if they express a wish so to do, are permitted to withdraw from the court to consider their verdict (*t*) ; and they are kept until they are agreed ; [and if they eat or drink at his charge for whom they afterwards find, that will set aside the verdict (*u*) ; and if they speak with either of the parties (or their agents) after they have gone out of the jury box, or if they receive any fresh evidence in private, or if (to prevent disputes) they cast lots for whom they shall find,—any of these circumstances will vitiate the verdict (*x*). In case the jurors do not agree before the

(*s*) As to the duty of the judge, with reference to leaving the case to the jury, or withdrawing it from their decision, see *Metropolitan Railway Company v. Jackson*, 3 App. Ca. 193 ; and *Dublin Wicklow and Wexford Railway Company v. Slattery*, *ib.* 1155.

(*t*) A verdict is either *privy* or *public* ; and it is stated by Blackstone, (vol. iii. p. 377), that “ a *privy* verdict is when the judge hath left or adjourned the court, and the jury being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court” ; though he adds, that, “ if the judge hath adjourned the court to his own lodgings, and there receives the verdict, it is a *public* and not a *privy* verdict.” He also states, that a *privy* verdict is of no force, unless afterwards affirmed openly in court, and that the jury may then vary from it, if they please ;

and that it is “ a dangerous practice, allowing time for the parties to tamper with the jury and therefore, very seldom indulged in.”

(*u*) *Hughes v. Budd*, 8 Dowl. P. C. 315 ; *Morris v. Vivian*, 10 Mee. & W. 137. By the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 23, the jury may (at the discretion of the judge) be allowed the use of a fire when out of court, and reasonable refreshment, to be procured at their own expense.

(*x*) In ancient times, the principal remedy for reversal of a verdict unduly given was by writ of *attaint* ; which was a proceeding for setting aside, by a jury of twenty-four, the verdict of a jury of twelve ; the effect of which was, that if the first jury were found to have given a false verdict, they incurred infamy, with imprisonment and forfeiture of their goods,—which two latter punishments were, in course of time, commuted into a pecuniary

[judges are about to leave the assize town, though they are not to be threatened or imprisoned (*y*), yet the judges are not bound to wait for them, but may carry them round the circuit, from town to town, in a cart (*z*),]—an ancient practice (which was not at all unpleasant in the summer-time) ; but in our own days, if the jury are unable, within a reasonable time, to agree upon their verdict, a juror is *withdrawn* (by consent of the parties), so that no verdict is given (*a*) ; or the whole jury may (with or without such consent) be *discharged* by the judge (*b*).

[The jury, when they are all agreed, return back into their places ; and before they deliver their verdict, the plaintiff must appear in court] by himself, or by his solicitor, or counsel ; and the jury, by their foreman, deliver in their verdict,—for the plaintiff or (as the case may be) for the defendant,—and if the verdict is for the plaintiff, they also, in certain actions, at the same time assess the damages by him sustained in consequence of the injury of which he has made complaint (*c*).

penalty ; and this writ of attaint was as old as the reign of Henry the Second, and remained in force (though quite fallen out of use) till abolished by the stat. 6 Geo. 4, c. 50, s. 60.

(*y*) *Mirroure*, ch. 4, s. 24.

(*z*) 3 Bl. Com. p. 376, citing Lib. Ass. fol. 40, p. 11 ; 1 B. & S. 429 ; Law Rep. 1 Q. B. 305.

(*a*) *Stodhart v. Johnson*, 3 T. R. 657 ; *Harries v. Thomas*, 2 Mee. & W. 38 ; *Gibbs v. Ralph*, 15 L. J. Ex. 7.

(*b*) *The Queen v. Charlesworth*, 1 B. & Smith, 460.

(*c*) By 3 & 4 Will. 4, c. 42, s. 28, the jury may, upon the trial of any issue or inquisition of damages,

allow *interest*, at the current rate, upon debts from the time when they were payable, if made payable by a written instrument, and at a time certain ; or if payable otherwise, then from the time when demand of payment shall have been made in writing, with notice that interest will be claimed (*Mowatt v. Lord Londesborough*, 4 Ell. & Bl. 1 ; *Duncombe v. Brighton Club Company*, Law Rep. 10 Q. B. 371) ; and (by sect. 29) they may give damages *in the nature* of interest, in actions of trover and trespass *de bonis asportatis*, over and above the value of the goods ; and also, in actions on policies of assurance, over and above the money insured.

If there should arise at the trial, upon the facts proved, any difficult matter of law, the jury may find a *special* verdict,—this proceeding being founded on the 13 Edw. I. c. 30, s. 2 (*d*) ; and in a special verdict, the jury state the naked facts, as they find them to be proved,—concluding conditionally, that if upon the whole matter the court should be of opinion that the issue ought to be found for the plaintiff, then they find for the plaintiff, and assess the damages accordingly ; and if otherwise, then for the defendant. And there is also another method of finding a special verdict; and this is, when the jury find a verdict, generally, for the plaintiff, but subject to the opinion of the court on a *special case*, stated by the counsel on both sides, and containing a statements of facts mutually agreed upon.

In case the judge should, at the trial, mistake the law, either in directing the jury or otherwise, counsel on either side might formerly have required him to seal a *bill of exceptions* to his ruling (*e*),—and this bill of exceptions was afterwards dealt with in the old court of Exchequer Chamber (*f*) ; and although bills of exceptions have now been abolished (*g*), yet the right of the parties to have the issues for trial properly submitted to the jury, with a full direction upon the law thereon, together with the power of enforcing such right in the Court of Appeal, upon an “exception” entered upon and annexed to the record, continues (*h*).

As regards a *non-suit*,—it will be remembered, that the plaintiff is required to appear in court at the time when

(*d*) *Mayor of Devizes v. Clark*, 3 A. & E. 506.

(*e*) 13 Edw. I, c. 31.

(*f*) The sufficiency in law of the facts proved at the trial to maintain the issues, might also formerly have been raised by a *demurrer to the evidence* ; but that practice has

been long discarded, in favour of an application for a new trial.

(*g*) Ord. xxxix. rr. 3, 6 ; Ord. lii. r. 2.

(*p*) 38 & 39 Vict. c. 77, s. 22 ; 39 & 40 Vict. c. 59, s. 17 ; *Cheese v. Lovejoy*, 2 P. D. 161.

the jury deliver in their verdict ; and this was, formerly, a matter of greater importance than it is now,—because, formerly, the plaintiff was liable to be *amerced* for a false claim (*q*),—*scil.*, when he was nonsuited. And in more modern times, it was still usual for a plaintiff, when he or his counsel perceived that he had not given evidence sufficient to maintain the issue, to be voluntarily nonsuited or to withdraw himself,—whereupon the crier was ordered to *call the plaintiff* ; and if neither he nor anybody for him appeared, the jurors were discharged, and the defendant had judgment of *nonsuit* and was entitled to his costs ; but after a nonsuit the plaintiff might have commenced the action again,—which he could not have done after a *verdict*. Under the present practice, the plaintiff cannot elect to be nonsuited (*r*),—although he may discontinue his action (*s*) ; however, the judge may *nonsuit* the plaintiff,—but not (unless by consent) before hearing his evidence (*t*) ; and a nonsuit must, of course, be applied for (if at all) before the verdict is given (*u*). The effect of a nonsuit, which was (for a short time) the same as a verdict (*x*), is not now so,—at least, in general (*y*).

2. *Trial before a Judge*.—A trial before a judge of questions of fact as well as of law, dispensing with a jury, was first introduced into the common law courts by the Common Law Procedure Act, 1854,—though it has always been (as it still is) the usual practice in the Court of Chancery (or Chancery Division) and in the Admiralty ; and under the Judicature Acts, this is one of the modes of trial which may be specified by the party bringing the

(*q*) *Finch*, L. 189, 252.

(*r*) *Fox v. Star Newspaper Co.*,
[1898] 1 Q. B. 636.

(*s*) Ord. xxvi. rr. 1—4.

(*t*) *Fletcher's Case*, [1892] 1
Q. B. 122.

(*u*) *Pinto v. Badman* (1891), 8

Rep. Pat. Ca. 181.

(*x*) Ord. xli. (1875), r. 6.

(*y*) Ord. xxvi. r. 1 ; *Poyser v.*

Minors, 7 Q. B. D. 329 ; *Stahlschmidt v. Walford*, 4 Q. B. D. 217.

action on for trial, in his notice of trial,—though the other party may (in a proper case) obtain an order of the court to have the facts tried before a judge and jury (*z*),—but a notice of trial, given generally, means now a trial before a judge without a jury.

3. *Trial before an Official or Special Referee.*—It was provided, by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 3, 6, that, if, at any time after the issuing of the writ of summons in an action, it was made to appear to the court or a judge, that there was no preliminary question as to the defendant's liability, but that the matter in dispute consisted wholly or in part of matters of *mere account* which could not conveniently be tried in the ordinary way,—an order might issue, that such matter should (upon reasonable terms as to costs and otherwise) be compulsorily referred to some arbitrator selected by the parties, or else to a Master or other officer of the Court (*a*) ; and by the Judicature Act, 1873 (36 & 37 Vict. c. 66), it was provided (by sect. 56), that (subject to the right of the parties to have disputed facts submitted to the verdict of a jury) (*b*) any question arising in any cause or matter (other than a criminal proceeding by the crown) might be referred (for *inquiry* and *report*) to an *official* or special referee (*c*), whose report (if adopted)

(*z*) Ord. xxxvi. rr. 3, 4, 5, 6 ;
Sugg v. Silber, 1 Q. B. D. 362 ;
Ruston v. Tobin, 10 Ch. D. 558 ;
Hunt v. Chambers, 20 Ch. D. 365.

(*a*) *Brown v. Emerson*, 17 C. B. 361 ; *Chapman v. Van Toll*, 8 Ell. & Bl. 396 ; *Clow v. Harper*, 3 Ex. D. 198.

(*b*) *Sugg v. Silber*, 1 Q. B. D. 362.

(*c*) The official referees are permanent officers attached to the Supreme Court ; and their number, qualification, and tenure of office

is determined by the Lord Chancellor, with the concurrence of the presidents of the divisions of the High Court of Justice, or a majority of them (of which majority the Lord Chief Justice of England must be one), and with the sanction of the Treasury ; and they perform the duties entrusted to them in such places, whether in London or in the country, as may be directed by order of court (36 & 37 Vict. c. 66, s. 83 ; Ord. xxxvi. rr. 45—55).

might be enforced as a judgment (*d*) ; and (by sects. 57—59), that (with the consent of the parties,—and (in certain cases) without such consent) any question or issue of fact or question of account might be ordered to be tried before an official or special referee,—that is to say, referred to him for *trial*,—and in that case, his report was equivalent to the verdict of a jury (*e*). But these references are now principally regulated by the Arbitration Act, 1889 (52 & 53 Vict. c. 49),—which has modified sect. 56, and repealed sects. 57 to 59, of the Judicature Act, 1873, besides repealing the Common Law Procedure Act, 1854, ss. 3—17, and certain other Acts relating to arbitration ; and now, under the Judicature Act, 1873, and the Arbitration Act, 1889, the law may be stated as follows, that is to say :—Subject to any right to have particular cases tried by a jury, the court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) to any official or special referee, for *inquiry and report* ; and the report may be adopted, wholly or partially, by the court or a judge ; and if adopted, it may be enforced as a judgment or order to the same effect ; and if all the parties interested (who are not under disability) consent,—or if the cause or matter requires any prolonged examination of documents, or any scientific or local investigation which cannot (in the opinion of the court or a judge) conveniently be made before a jury or conducted by the court through its other ordinary officers ; or if the question in dispute consists, wholly or in part, of matters of account,—the court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before any special referee to be agreed on by the parties, or else before an official referee or officer of the court,—

(*d*) *Dunkirk Colliery v. Lever*,
9 Ch. D. 20 ; Ord. xxxvi. rr. 45—
55.

(*e*) *Rowcliffe v. Leigh*, 3 Ch. D.
292 ; *Leigh v. Brooks*, 5 Ch. D.
592.

in which latter case, the official or special referee is to be deemed an officer of the court ; and in either case,—that is to say, whether the reference is for inquiry and report or for trial,—then (subject to the terms of the order of reference) the referee holds the inquiry or trial at any place which he deems expedient; and he may have an inspection or a view; and he proceeds with the inquiry or trial *de die in diem*, in a similar manner as in actions tried by a jury before a judge of the High Court,—but his tribunal is not a public court of justice (*f*) ; and before the conclusion of any trial before him, or by his report, the referee may submit any question arising therein, or may state any facts specially,—for the decision of the court (*g*) ; and the court has power to require any explanation or reasons from the referee, and to remit the matter referred, or any part thereof, for re-trial or further consideration, to the same or any other referee,—or the court may itself decide the question, and that either on the evidence already taken before the referee or otherwise (*h*) ; and generally, the court or a judge has and may exercise (as regards these references) all the powers which are (by the Arbitration Act, 1889) conferred on the court or a judge as to *voluntary* arbitrations out of court.

IV. THE JUDGMENT.—The issues in the action having been decided in one or other of the several modes of trial

(*f*) Ord. xxxvi. r. 48.

(*g*) The referee had originally no power to order judgment to be entered up (*Longman v. East*, 3 C. P. D. 142) ; and although, under the Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 9, and Ord. xxxvi. r. 50, the terms of the reference to the official referee might have been such as that he should try the whole action,—in which case, he might have directed

judgment to be entered, and might have exercised the same discretion as to costs as the court or judge could have exercised,—the Arbitration Act, 1889 (52 & 53 Vict. c. 49), has now, *semble*, repealed all these provisions,—so that the powers of the official referee are now limited to those mentioned in the text.

(*h*) *Dunkirk Colliery v. Lever*, 9 Ch. D. 20.

above described, the next step is the *judgment* ; and inasmuch as no judgment can be entered (after verdict) without an order of the judge (*i*),—therefore, some application for judgment must be made ; and if the application is made (and usually it will be made) at the trial, the judge may then and there order judgment to be entered,—in which case, the judgment will afterwards be entered by the proper officer of the court, on the production of the *associate's certificate* to that effect, such certificate now forming the substitute for what was formerly known as the *postea* ; but after verdict given, the judge,—in lieu of ordering judgment to be at once entered,—may adjourn the action *for further consideration* ; or may leave either party *to move for judgment*.

The practice of adjourning a judgment for “further consideration” had been long in use in the Court of Chancery, but was not introduced into the Queen’s Bench Division of the High Court, until the 39 & 40 Vict. c. 59, s. 17, enacted, that the proceedings in an action *subsequent to the trial* should (where practicable) take place before the judge before whom the trial had taken place ; and since that Act, the further consideration is now very generally reserved (in a proper case) in the Queen’s Bench Division.

But the judge may also, at the trial, leave either party *to move for judgment* ; and in that case (*k*), the plaintiff may move for judgment, and (in case of plaintiff not doing so for ten days after the trial) the defendant may move for judgment. Also, where (at or after any trial with a jury) the judge has directed judgment to be entered, either party may apply to set aside such judgment, and to enter any other judgment,—on the ground, that the judgment directed to be entered is wrong, by reason that the

(i) Ord. xl. r. 1.

(k) *Ibid.* r. 2.

finding of the jury upon the facts has not been properly entered ; or on the ground that, upon the finding as entered, the judgment so directed is wrong (*l*) ; and in either case, the application is to be made to the Court of Appeal (*m*) ; and all applications for a new trial are also now made to the Court of Appeal (*n*). And upon every such motion for judgment, and also upon every motion that the judgment be set aside and another entered, the party who moves may, in support of his motion, urge any ground which goes to show, that he is entitled to the judgment he claims, by reason of the opposite party having either no cause of action or (as the case may be) no sufficient defence ; and the court may direct judgment to be entered without regard to the findings of the jury (*o*).

Where either party is dissatisfied with the result of the trial, and contends,—either (1) that the jury have come to a wrong conclusion on the facts, or were not properly directed by the judge ; or (2) that the judge wrongly directed a verdict or a nonsuit (*p*),—in either of such cases, the party dissatisfied may apply for a new trial,—which application used to be made to a *Divisional Court*, but is now made to the Court of Appeal (*q*). And the ground of the application (for a new trial) may also be some irregularity in the proceedings connected with the trial,—such as want of notice of trial ; or any flagrant misbehaviour

(*l*) Ord. xl. rr. 3, 4.

(*m*) *Ibid.* r. 5.

(*n*) 53 & 54 Vict. c. 44.

(*o*) Formerly, such ground was urged in what was called a *motion in arrest of judgment* ; or for *judgment non obstante veredicto*,—the first being made by an unsuccessful defendant, the latter by an unsuccessful plaintiff ; but both motions are now out of use. And a motion (of the same general

character) termed a *motion for a repleader*, in respect of the issues raised in the pleadings being not to the point, which motion might have been made by either party, is now out of use also.

(*p*) *Yetts v. Foster*, 3 C. P. D. 437 ; *Etty v. Wilson*, 3 Ex. D. 309 ; *Solomon v. Bitton*, 8 Q. B. D. 176 ; *Phillips v. L. & S. W. Rail. Co.*, 5 Q. B. D. 78.

(*q*) 53 & 54 Vict. c. 44.

of the successful party towards the jury, or gross misbehaviour of the jury themselves; or the ground of the application (for a new trial) may be, that the verdict is unsupported by (or is contrary to) the evidence; or that the damages are exorbitant or insufficient; or that the judge has misdirected the jury. In every case, the motion is made on notice,—and the notice must specify the ground or grounds upon which the application is rested (*r*); and if (on the hearing of the motion) a new trial be ordered, then a trial of the same issue, (by a new jury duly summoned and impanelled as in other case,) is instituted *de novo* (*s*).

[The power of the court to set aside the verdict and grant a new trial, on account of misbehaviour in the jurors, is of a date extremely antient (*t*); and in the reign of Charles the Second, new trials came to be granted upon *affidavits*,—the former strictness of the courts of law, in respect of new trials, having been then considerably relaxed (*u*),—as it continued to be, until comparatively recent times;] but the courts do not, now, lend an easy ear to this sort of application,—and require to be satisfied, that the merits have not been fairly discussed (*x*),—so that a new trial will not be granted, where the matter is too inconsiderable, nor upon nice objections, which do not go to the real merits; nor where the scales of evidence hang nearly equal, and the jury might reasonably have found as they have found (*y*).

(*r*) Ord. xxxix. r. 3.

(*s*) If the new trial was ordered in consequence of a mis-trial apparent on the record, the award used to be called a *renire de novo*. (*Wood v. Bell*, 6 Ell. & Bl. 355, 363.)

(*t*) 24 Edw. 3, 24; Bro. Ab. tit. Verdite, 17; 11 Hen. 4, 18; Bro. Ab. tit. Enquest, 75; 14 Hen. 7, 1;

Bro. Ab. tit. Verdite, 18; Style, 466; *Graves v. Short*, Cro. Eliz. 616; Palm. 325; 1 Brownl. 207.

(*u*) *R. v. Lord Fitz-Water*, 1 Sid. 235; *Goodman v. Cotherington*, 2 Lev. 140.

(*x*) Ord. xxxix. r. 6.

(*y*) *Metropolitan Rail. Co. v. Wright*, 11 App. Ca. 152.

The next step in the regular course of an action, is for the successful party to cause the *judgment to be entered* by the proper officer of the court ; and this is done, upon his delivering to such officer the associate's certificate of the judge's directions at the trial, together with a copy of the whole of the pleadings in the action other than any petition or summons (z) ; and immediately after the time when such judgment shall thus have been duly entered, every person to whom, under it, any money or costs shall be payable, may forthwith enforce the same by execution as presently to be mentioned, — unless, indeed the execution has been stayed for a time by order of the court.

Judgments are either *interlocutory* or *final*,—an *interlocutory* judgment being one which does not finally determine or complete the action. And (in the Queen's Bench Division) interlocutory judgments are mostly those whereby the *right* of the plaintiff is established, but the *quantum* of the damages is not ascertained,—which happens, *e.g.*, where the defendant, in any action brought for the detention of goods or for pecuniary damages, suffers judgment to go against him by default. In such a case, the plaintiff is entitled to an interlocutory judgment ; but because the court does not know the value of the goods or what damages the plaintiff has sustained, there must therefore be either a writ of inquiry or some other proceeding to ascertain the value or the *quantum* of the damages (a). And if the damages are to be assessed under a writ of inquiry,—as is the case, in general,—the writ is addressed to (and is executed by) the sheriff, who (by his under-sheriff) ascertains (by the verdict of a jury) what damages the plaintiff has really sustained ; and when the verdict is given, the sheriff returns the inquisition into court, — whereupon it is adjudged, that the plaintiff do recover the

(z) Ord. xli. rr. 1, 4.

(a) Ord. xiii. r. 5.

sum so assessed and his costs. But in many cases, though the action “*sounds* in damages,” yet the amount recoverable by the plaintiff is substantially a matter of mere calculation ; and in such cases, the course (as laid down by the Common Law Procedure Act, 1852) is not to issue any writ of inquiry, but to apply for an order of the court or a judge, that the amount which the plaintiff is entitled to recover shall be ascertained by one of the Masters (*b*).

A *final* judgment, on the other hand, is a judgment that is final in the first instance (*c*).

At common law, all judgments had relation to the first day of the term in which they were signed, though in point of fact not signed till afterwards (*d*),—the Term having been considered, for this and some other purposes, as consisting but of one day ; but, by the present practice, all judgments (whether interlocutory or final) are entered of record of the day of the month and year when they are actually pronounced,—or (as the case may be) when the requisite authority or papers are left with the proper officer, to enable him to enter the judgment (*e*) ; and judgments have now no relation to any other day,—although it is competent for the court to order a judgment to be entered *nunc pro tunc* (*f*) ; and by the 1 & 2 Vict. c. 110, s. 7, every judgment debt carries interest (leviable along with the principal) (*g*), at the rate of 4l. per cent. per annum, from the time of entering up the judgment until the same shall be satisfied.

(*b*) 15 & 16 Vict. c. 76, s. 94.

(*c*) *Ibid.* s. 93.

(*d*) *Jeffreson v. Morton*, 2 Saund. by Wms. 8 k.

(*e*) Ord. xli. rr. 1, 4.

(*f*) *Miles v. Williams*, 9 Q. B. 47 ; *Fishmongers' Company v. Robertson*, 3 C. B. 970 ; *Freeman v.*

Tranah, 12 C. B. 406 ; *Heathcote v. Wing*, 11 Exch. 355 ; *Moor v. Roberts*, 3 C. B. (N.S.) 844 ; and Ord. lii. r. 15.

(*g*) Ord. xlii. r. 16 ; *Newton v. Grand Junction Railway Co.*, 16 Mee. & W. 139.

And before we proceed to consider the modes of *execution* upon a judgment,—which is the next principal matter to be considered,—we will give a brief explanation regarding the old *Terms* and the modern *Sittings*; and we will then add a short exposition regarding the *Costs* in an action.

[And, Firstly, as regards **TERMS**.—The distinction of the legal year into *terms* is still of some slight importance (*h*); and it may therefore be shortly stated, that (after a somewhat varying practice) (*i*) the rule (as mentioned in Britton) (*k*), in the reign of King Edward the First, was, that no secular pleas could be held (nor any man sworn on the Evangelists) in the times of Advent, Lent, Pentecost, harvest, and vintage; or in the days of the great litanies; or during any solemn festivals; but the bishops might grant dispensations,—of which many are preserved in Rymer's *Fœdera* (*l*),—whereby assizes might be held in some of these holy seasons; and afterwards, by the Statute of Westminster the First, (3 Edw. I.) c. 51, the *assizes of novel disseisin, mortancestor, and darreign presentment*, might be taken in Advent, Septuagesima, and Lent. The portions of time, not included within the prohibited seasons, fell naturally into a fourfold division,—and, from the festival day that immediately preceded their commencement, were denominated the Terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael,—which Terms were afterwards regulated by successive Acts of Parliament, and, ultimately, by the 11 Geo. IV. & 1 Will. IV. c. 70.

Immediately prior to the date of the last-mentioned Act, Easter and Trinity Terms depended on the *moveable*

(*h*) *College of Christ v. Martin*,
3 Q. B. D. 16; 36 & 37 Vict. c. 66,
s. 26.

(*i*) Spelman, Of the Terms.

(*k*) Cap. 53.

(*l*) Tem. Hen. 3, *passim*.

[feasts of Easter and Trinity ; but by the provisions of the Act, Hilary Term was fixed to begin on the 11th and end on the 31st January ; and Easter Term, to begin on the 15th April, and end on the 8th May ; and Trinity Term, to begin on the 22nd May, and end on the 12th June ; and Michaelmas Term, to begin on the 2nd November, and end on the 25th November (*m*). And, in case the day of the month on which any Term was to *end* fell on a Sunday, the Monday next after was the last day of Term (*n*).

There were certain proceedings which used to be conducted exclusively in Term,—*e.g.*, the sittings in *banc* for the determination of matters of law ; but the courts of *assize* and the *nisi prius* sittings were for the most part held in the vacations—that is, during the intervals between the Terms ; and all proceedings *out of court*,—that is to say, such as did not require the actual presence of the judges themselves, but could be transacted between the parties and their solicitors,—were in modern times transacted during any part of the year (with the exception of a period of recess, known as the “long vacation,” viz. from the 10th August to the 24th October) (*o*).] But the inconvenience to suitors from the above restrictions being severely felt, the division of the legal year into Terms was

(*m*) *Wright v. Lewis*, 9 Dowl. 183 ; *Donnes v. Bostock*, *ib.* 241.

(*n*) 1 Will. 4, c. 3, s. 3 ; *Doe v. Roe*, 1 Dowl. 63.

(*o*) The practice was antiently very different ; for, antiently, all writs must have been made returnable in term ; every pleading and every entry of judgment, even when in fact delivered or entered in vacation, must always have been intituled of some antecedent

term ; the plaintiff, though at liberty to *declare* in vacation, could not compel the defendant to plead until the subsequent term ; and a party obtaining a verdict in vacation, on the trial of any issue, or on any inquisition of damages, had also to wait, in every case, until the term next following, before he could sign final judgment, or take out execution.

eventually abolished, so far as relates to the administration of justice, by the Judicature Acts, which provided, that there should no longer be Terms applicable to any sitting or business of the High Court of Justice, or the Court of Appeal,—it being also provided, however, that where under the then existing law, the terms into which the legal year was divided were used as a measure for determining the time at or within which any act was required to be done, the same might continue to be referred to, for the same or the like purpose (*p*). And there are now four *sittings* of the Supreme Court in every year (*q*), viz.: (1) The Michaelmas sittings, commencing the 2nd November (but, by Order in Council, commencing, in fact, the 24th October) and ending the 21st December; (2) The Hilary sittings, commencing the 11th January and ending the Wednesday before Easter; (3) The Easter sittings, commencing on the Tuesday after Easter week and ending on the Friday before Whit Sunday; and (4) The Trinity sittings, commencing on the Tuesday after Whitsun week and ending the 8th August (*r*), (but, in fact, by Order in Council, ending the 12th August); and there are the following four vacations in every year (*s*), viz.: (1) The Long vacation, commencing the 10th August and ending the 24th October, (but by Order in Council, commencing the 13th August and ending the 23rd October); (2) The Christmas vacation, commencing the 24th December and ending the 6th January; (3) The Easter vacation, commencing on Good Friday and ending on Easter Tuesday; and (4) the Whitsun vacation commencing on the Saturday before Whit Sunday and ending on the Tuesday after Whit Sunday. Also, during these vacations, two of the judges (called “Vacation Judges”) sit for the hearing of matters of an

(*p*) 36 & 37 Vict. c. 66; s. 26;
College of Christ v. Martin, 3
 Q. B. D. 16.

(*q*) Ord. lxiii. (1883); *Daubney v. Shuttleworth*, 1 Ex. D. 53.

(*r*) Ord. lxiii. (1883) r. 1.

(*s*) *Ibid.* r. 4.

urgent character (*t*). And subject to the above arrangements, the sittings of the court are *continuous* (*u*).

Secondly, as regards Costs.—The common law (it is said) did not allow costs (*x*) ; and certainly, the general opinion is, that costs depend upon statute only. And, in particular, there were many cases of vexatious proceedings, in which the legislature at one time provided, that the party in fault should pay *double* or (sometimes) *treble* costs ; but, by the 5 & 6 Vict. c. 97, all such provisions were repealed, and a full and reasonable indemnity only, in the shape of *taxed costs*, was to be paid.

The first statute which directed that costs should be given to a successful plaintiff in an action at law, was the Statute of Gloucester (6 Edw. I. c. 1) (*y*) ; prior to which Act, costs were included in (and were recoverable as part of) the damages, in those actions in which damages were given ; but because those damages were frequently inadequate to the *plaintiff's* expenses, therefore the Statute of Gloucester ordered costs (*eo nomine*) to be also added. But as the general rule, no costs were allowed to the *defendant* in an action at law, in any shape, till the 23 Hen. VIII. c. 15, 8 Eliz. c. 2, 4 Jac. I. c. 3, 8 & 9 Will. III. c. 11, and 4 & 5 Ann. c. 3 ; and these gave the defendant, if he prevailed, the same costs as the plaintiff would have had in case he had succeeded. But even after these enactments, there still remained several points in which the law of costs was defective, as regards both the plaintiff and the defendant ; and various provisions were from time to time passed, with the object of amending these defects (*z*) ; by one of which, it was provided, that if a plaintiff, instead of taking out execution

(*t*) Ord. lxiii. r. 11.

(*u*) 36 & 37 Vict. c. 66, s. 30.

(*x*) Cod. 3, 1, 13.

(*y*) 3 Bl. Com. 399 ; 42 & 43 Vict. c. 59 ; *Bentley v. Davies*, 10 Exch. 347.

(*z*) 9 Ann. c. 25 ; 1 Will. 4, c. 21 ; 3 & 4 Will. 4, c. 42, ss. 31—34 ; 15 & 16 Vict. c. 76, ss. 81, 146, 223 ; 17 & 18 Vict. c. 125, ss. 42, 44, 57, 67, 93 ; 23 & 24 Vict. c. 126, ss. 11, 27, 32.

upon a judgment he had recovered, should bring an action thereon, he should have no costs of the latter suit, unless the court or a judge should otherwise order (*a*) ; and it was also (among other matters) laid down (under these enactments), that though the party who substantially succeeded should have the *general costs* of the action, yet his adversary,—where he succeeded on any particular issue of law or of fact,—should have the costs of that issue (*b*). And by the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5, in order to prevent the practice of suing in the High Court in matters of small amount, it was provided, that if a plaintiff who resorted thereto and recovered a sum not exceeding 20*l.* in contract,—or no more than 10*l.* in tort,—he should have no costs of suit, unless the court or a judge should certify on the record that there was sufficient reason for his taking that course (*c*) ; and these provisions are continued by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116,—with this variation, namely, that such costs may now be allowed by special order ; and with this addition, namely, that if judgment is obtained on a specially indorsed writ (within usually twenty-one days after service of the writ), that judgment shall carry costs. In a penal action, no costs were ever allowed to a plaintiff suing as a common informer,—unless where they were expressly given by the statute on which he sued ; for, as the action itself created the right, he had no claim to damages ; and the general rule of law used to be, that where there were no damages, there were no costs (*d*) ; but such costs would, *semble*, now go with the judgment, unless the judge interposed his discretion (*e*). And as regards *pauper suitors*,—

(*a*) 43 Geo. 3, c. 46, s. 4 ;
Adam v. Ready, 6 H. & N.
 261.

(*b*) 15 & 16 Vict. c. 76, s. 81.

(*c*) *Marshall v. Martin*, Law
 Rep. 5 Q. B. 239.

(*d*) *College of Physicians v.*
Harrison, 9 B. & C. 524

(*e*) 42 & 43 Vict. c. 59.

that is, such as will swear themselves not worth 25*l.* (formerly 5*l.*) in the world, except their wearing apparel and the matter in question in the cause (*f*).—they were, by the 11 Hen. VII. c. 12 and 23 Hen. VIII. c. 15, exempted from the payment of court fees (*g*): and under the present practice, they are entitled to have counsel and a solicitor assigned to them without fee; and they are excused from paying costs when unsuccessful,—though it has been said they shall suffer other punishment at the discretion of the judges (*h*); but a person thus suing or defending may recover costs (being, however, only his costs out of pocket) (*i*),—for the counsel and clerks of court are bound to give their labour to *him* only, and not to his antagonist (*k*).

It is, however, to be observed, that, in the Court of Chancery, the costs to be given to either party were never held to be a matter of *right*,—but were merely discretionary, according to the circumstances of the case (*l*); and they still are so (*m*); also, generally, the costs of and incident to all proceedings in the High Court are in the discretion of the court,—although, where the action is tried by a jury, *the costs shall follow the event*, unless upon application made at the trial, and for good cause shown, the judge before whom the action was tried (or the court) shall

(*f*) *Pratt v. Delarue*, 10 Mee. & W. 512; Ord. xvi. rr. 22—30.

(*g*) These Acts *in favorem paupertatis* had no application to the case of a *defendant*.

(*h*) Blackstone says (vol. iii. p. 400), that it was formerly usual to give pauper plaintiffs, if non-suited, their election, *either to be whipped or to pay their costs*; and (by the 56 & 57 Vict. c. 22) the appeals of paupers to the House

of Lords have been placed under stringent regulations. Also, by the 59 & 60 Vict. c. 51, certain vexatious litigants may be deprived altogether of the right to use (*i.e.*, to misuse) the courts.

(*i*) Ord. xvi. r. 31; *Carson v. Pickersgill*, 14 Q. B. D. 859.

(*k*) 3 Bl. Com. 401.

(*l*) *Ibid.* 452.

(*m*) 53 & 54 Vict. c. 44, s. 5.

otherwise order (*n*). Moreover, no order as to costs left to the discretion of the court shall (except by leave) be subject to appeal (*o*).

V. THE EXECUTION.—If the judgment entered in the High Court be not suspended, varied, or reversed by the Court of Appeal, as presently to be mentioned, the next step in the action is the *execution* of that judgment, or putting the sentence of the law in force. Now there are different writs of execution; for besides the executions called respectively *attachment* and *sequestration* (which are, in effect, against the person of the debtor) (*p*), there are writs of execution against his *goods* (*q*), and also writs against his *lands* (*r*). But as regards the operation of judgments on

(*n*) Ord. lxx. r. 1; but this is not to deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund “*to which he would be entitled according to the rules hitherto acted upon in courts of equity*” (*Smith v. Dale*, 18 Ch. D. 516; *Ex parte Russell, In re Butterworth*, 19 Ch. D. 588; *Hill v. Spurgeon*, 29 Ch. Div. 348).

(*o*) 36 & 37 Vict. c. 66, s. 49; *Re Bradford*, 15 Q. B. D. 635.

(*p*) See further as to these, *post*, chap. xi.

(*q*) Until a recent period, execution on a judgment might also, in cases above 20*l.*, have issued against the *person* of the debtor; who might have been arrested and imprisoned, under the writ of *capias ad satisfaciendum*; but, by the 32 & 33 Vict. c. 62 (the Debtors Act, 1869), no person may now be arrested or imprisoned for making default in payment of a sum of money, except in the

cases specified in sect. 4 of the Act (*Chard v. Jervis*, 9 Q. B. D. 178; *Brooks v. Edwards*, 21 Ch. D. 230; 41 & 42 Vict. c. 54); and except that persons who (having the means) refuse or neglect to pay certain small debts (*i.e.*, debts not exceeding 50*l.*), due from them in pursuance of any order or judgment, may be committed *for a term of six weeks or until payment* (*Hewitson v. Sherwin*, Law Rep. 10 Eq. Ca. 53); and the committal order may be made either in the superior court or by the county court, according to where the judgment or order was obtained. (*Dillon v. Cunningham*, Law Rep. 8 Exch. 23.) Persons so committed (or imprisoned) are subject to the differential treatment provided for by the 61 & 62 Vict. c. 41.

(*r*) 1 & 2 Vict. c. 110, s. 11. A judgment against a mortgagee (which would formerly have bound the land mortgaged, even though the mortgage was paid off and the

lands, the 23 & 24 Vict. c. 38, s. 1, has now provided, that (as regards a purchaser for valuable consideration or a mortgagee) no judgment shall affect any *land*, unless execution thereon shall have been issued and registered at the proper office of the High Court (that is to say, in the Central Office); and the 27 & 28 Vict. c. 112, s. 1, has provided, that no judgment entered up after the 29th July, 1864, shall affect any land until the land shall have been also *actually delivered in execution* (s); also, the writ (or other process of execution) must be registered in the name of the debtor against whom it is obtained, instead of (as previously) in the name of the creditor; and it must also be registered in the office of Land Registry, in the register for writs and orders affecting lands (t). And as regards the operation of judgments on *goods*, by the 19 & 20 Vict. c. 97 (the Mercantile Law Amendment Act, 1856), the goods are bound, as against purchasers without notice, only from the time of the actual seizure thereof under the execution,—though, as between the parties themselves to the action, the goods are bound from the date (or teste) of the writ: and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), while it repeals the last-mentioned Act, enacts to the like effect, only saying more specifically, that the goods shall be bound *as from the time when the writ is delivered to the sheriff* (sect. 26),—except as against a purchaser in good faith and for value who has no notice that the writ has been delivered to, and remains unexecuted with, the sheriff (sect. 26) (u).

land actually conveyed to a purchaser or another mortgagee) has no longer that effect (18 & 19 Vict. c. 15, s. 11).

(s) 4 Will. & M. c. 20; 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11; 18 & 19 Vict. c. 15; *Kemp v. Waddington*, Law Rep. 1 Q. B. 355; *Gardner v. London, Chatham*

and Dover Railway Co. *ib.* 2 Ch. App. 385; *Hatton v. Haywood*, *ib.* 9 Ch. App. 229; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.

(t) 51 & 52 Vict. c. 51, ss. 5, 6.

(u) *Hasluck v. Clark*, [1899] 1 Q. B. 699, and cases there cited.

There are, in general, specific executions for specific judgments ; and not all executions issue on all judgments. Thus, in an ordinary legal action, the judgment is in general for the recovery of *money* only, and not for the recovery of any specific chattel,—there being, however, an exception to this in the case of *detinue*, in which the judgment is for the recovery of the goods themselves which are detained (or the value thereof) with damages and costs. In *detinue* accordingly, there was a special process of execution in use (called a *distringas*), to compel the defendant to deliver the goods, by repeated distresses levied upon his chattels ; and this writ was recognized by (and was regulated under) the Common Law Procedure Act, 1854 (*v*) ; and, under the Judicature Acts, it is preserved, under the name of a writ of delivery (*x*). Again, in an action for the *recovery of land*, a judgment for the plaintiff therein, requiring the defendant to deliver the possession thereof to the plaintiff, may be enforced by a writ of *possession* ; and by such writ of possession, the sheriff is commanded to enter on the land which is the subject of the action, and to cause the plaintiff to have possession thereof with its appurtenances (*y*).

And as regards writs of execution generally, it should be mentioned, that the writ must be executed within a year from the date of its issue,—unless it should, in the meantime, have been properly renewed ; but the writ may issue (as between the original parties) at any time within *six years* from the recovery of the judgment,—though, after that time, the party alleging himself to be entitled to execution must apply to the court or judge for leave to issue it (*z*).

The leave of the court, before issuing execution on a judgment, may also be required by reason of a *change*

(*v*) 17 & 18 Vict. c. 125, s. 78 ;
Chilton v. Carrington, 15 C. B.
 730.

(*x*) Ord. xlviii.
 (*y*) Ord. xlvii.
 (*z*) Ord. xlii. r. 23.

of parties to the action : Which change may occur, first, by *death*,—wherein the rule formerly was, that if either of the parties died before final judgment the action would abate, and (if the death took place after final judgment) a *scire facias* was necessary in order to enforce the execution ; but under the present practice (*a*), and ever since the Common Law Procedure Act, 1852, in fact (*b*), the death of either plaintiff or defendant does not cause the action to abate, but the proceedings (supposing the right of action to survive) is ordered to be continued by or against the proper parties. Again, if a female plaintiff or defendant *married*, the action used to be thereby abated,—and (where judgment had been obtained) the plaintiff was driven to *scire facias* to enforce the judgment (*c*) ; but, after the Common Law Procedure Act, 1852, an action did not abate by marriage,—though a *suggestion* on the record was required of the marriage ; and the like *suggestion* was necessary, in case a plaintiff became a bankrupt, after he had obtained judgment, but before he had issued execution (*d*). And under the Judicature Acts, the law on these matters has not been altered, but the process requisite to carry on the proceedings (at whatever stage of the action the change of parties occurs) has been made more simple,—it being provided, that in the case of the marriage, death, bankruptcy, or devolution of the estate by operation of law, of any party to an action during the pendency thereof,—such order may be made, as to new parties (or as to a change in the capacity in which the original parties sued or were sued), as shall be deemed necessary by the court for a complete settlement of all the questions involved in the action,—and this merely upon

(*a*) Ord. xvii. (before final judgment) ; Ord. xlii. (after final judgment).

(*b*) 15 & 16 Vict. c. 76, s. 135 ;
17 & 18 Vict. c. 125, s. 92.

(*c*) *Walker v. Goslen*, 11 Mee. & W. 78 ; *Underhill v. Devereux*, 2 Saund. by Wms. 72 k.

(*d*) *Winter v. Kretchman*, 2 T. R. 45.

an *ex parte* application, the order being served on any party affected thereby ; who, if he objects thereto, must, within twelve days of the service, apply that the order may be discharged or varied (*e*).

The following are the writs of execution by which a judgment for the recovery of money is enforced :—

1. A *FIERI FACIAS*.—This is an execution against the goods and chattels of the judgment debtor,—and it is so termed from the words of the writ, whereby the sheriff is commanded *quod fieri facias de bonis* (that he cause to be made of the goods and chattels of the party), the amount of the judgment debt ; and from this writ neither peers nor any other privileged persons are exempt ; and it lies against executors or administrators, with regard to the goods of their deceased testators or intestates (*f*). The sheriff may not break open any outer door to execute the writ ; but must enter peaceably (*g*), and may then break open any inner door in order to take the goods (*h*) ; but he cannot execute the writ on a Sunday (*i*), or within the precincts of a royal residence (*k*). The sheriff may sell the goods and chattels of the debtor (*l*),—including even his estates for years, or his growing crops,—till he has raised enough to satisfy the judgment (*m*) ; but the exercise of this power of sale in the sheriff is subject to certain safeguards and limits, that is to say : By the 8 Anne, c. 18, the landlord must be first paid his rent due before

(*e*) Ord. xvii. rr. 1—3.

(*f*) 3 Bl. Com. 417 ; *Fenwick v. Laycock*, 2 Q. B. 108.

(*g*) 5 Rep. 92.

(*h*) Palm. 54 ; *Morrish v. Murray*, 13 Mee. & W. 52.

(*i*) Arch. Pr. 13th ed. p. 527.

(*k*) *Att.-Gen. v. Dakin*, Law Rep. 4 H. L. 338 ; *Combe v. De la Bere*, 22 Ch. D. 316.

(*l*) The sale may be either by auction or by private treaty ; and it is not unusual for the sheriff to hand over the goods to the execution creditor himself (or to any friend of his), at a fair valuation. (*Herniman v. Bowker*, 25 L. J. Exch. 69 ; *Haddow v. Morton*, [1894] 1 Q. B. 95, 565.)

(*m*) 3 Bl. Com. 417.

the execution, to the extent of one year's arrears (*n*) ; and by the 56 Geo. III. c. 50, no straw, hay, manure, or the like, which by the covenants of the lease is prohibited as between the landlord and the tenant from being carried off the premises, may be sold, *save to some person who will agree (in writing) to use and expend the same upon the premises and according to the obligation of the tenant (o)* ; and by the 14 & 15 Vict. c. 25, s. 2, if growing crops are seized and sold on a *fi. fa.* or other writ of execution by the sheriff, they shall still, so long as they remain on the lands (and where there is no other sufficient distress), be liable to be distrained for rent becoming due from the tenant after such seizure and sale,—although goods once sold cannot be again taken in *execution* for the same debt (*p*).

No personal chattel which was not in its nature properly capable both of manual seizure and of sale could be taken under this writ ; but now, by the 1 & 2 Vict. c. 110, s. 12, the sheriff may take any *money, bank notes, bills of exchange, or other securities for money*, belonging to the judgment debtor (*q*),—suing upon such bills or securities in his own name, and paying over the money to be recovered thereon to the creditor.

In case the sheriff is unable to sell, at a reasonable price, the goods taken in execution, he may make his

(*n*) *Rissley v. Ryle*, 11 Mee. & W. 17 ; *Wollaston v. Stafford*, 15 C. B. 278. It is, however, provided, by 7 & 8 Vict. c. 96, s. 67, that no landlord of any tenement let at a *weekly* rent shall have any claim or lien upon any goods taken in execution under the process of any court of law, for more than *four weeks'* arrears of rent ; and, in like manner, in the case of a tenement let for any other term *less*

than a year, the landlord shall not have any such claim or lien for more than the arrears of rent accruing during *four* such terms or times of payment (*Wharton v. Naylor*, 12 Q. B. 673).

(*o*) *Wilmot v. Rose*, 3 Ell. & Bl. 563.

(*p*) *Haddow v. Morton*, *supra*.

(*q*) *Collingridge v. Paxton*, 11 C. B. 683.

return upon the writ, that they remain in his hands for want of buyers,—upon which the judgment creditors may proceed to take out a writ of *venditioni exponas* or writ *assistant*, under which the sheriff is bound to sell the goods at all hazards, *i.e.*, for the best price that can be obtained, however inadequate (*r*).

2. A LEVARI FACIAS.—This was an execution which affected a man's goods and the *profits* of his lands,—the writ commanding the sheriff to levy the judgment debt on the lands and goods of the party against whom it was issued ; and on this writ the sheriff seized all the debtor's goods, and, till satisfaction was made, received the rents and profits of his lands (*s*) ; but now no writ of *levari facias* may issue in any civil proceeding (*t*). But analogous to the writ of *levari facias*, there is a writ of execution, proper only against the clergy, and which is given, when the sheriff (upon a common writ of *fieri facias*) returns *nulla bona*, and that the party is a beneficed clerk, not having any lay fee (*u*). In which latter case, inasmuch as *bona ecclesiastica* are not to be touched by lay hands, a writ, in the nature of a *levari facias* (*x*), but which is termed a *sequestrari facias de bonis ecclesiasticis*, goes to the bishop of the diocese, commanding him to enter into the benefice, and to take and sequester the same into his possession, until he shall have levied the amount of the judgment debt out of the rents, tithes, and profits thereof (*y*) ; and thereupon the bishop sends out a *sequestration* of the profits of the clerk's benefice,—directing the churchwardens to collect such profits, and (after providing thereout for the offices of the church) to pay over

(*r*) *Keightley v. Birch*, 3 Camp. 521 ; Ord. xliii. r. 2.

(*s*) Finch, L. 471.

(*t*) 46 & 47 Vict. c. 52, s. 146.

(*u*) 3 Bl. Com. 418.

(*x*) Reg. Orig. 300 ; Judic. 22 ; 2 Inst. 4.

(*y*) *Harding v. Hall*, 10 Mee. & W. 42 ; Ord. xliii. r. 5.

the surplus to the judgment creditor, until the full sum due is paid (*z*).

3. AN ELEGIT.—This species of execution was given by the Statute of Westminster the second, (13 Edw. I.), c. 18 (*a*); for before that statute, a man could only have the *profits* in satisfaction of his judgment, but not the *possession* of the lands themselves. Upon an *elegit* issued under the 13 Edw. I. c. 18,—and which *elegit* extended to the goods as well as to the lands,—the judgment debtor's goods and chattels were not sold (as on a *fi. fa.*) but only appraised, and then (except his oxen and beasts of the plough) were offered to the judgment creditor at such appraisement in satisfaction of his debt (*b*); and if the goods of the debtor proved not to be sufficient, then one *moiety* of the debtor's lands of freehold tenure, which he had at the time of the judgment given (whether held in his own name or by any other in trust for him) were also to be delivered to the judgment creditor,—to hold till out of the rents and profits thereof the debt was levied, or till the judgment debtor's interest therein expired (*c*). And now, by the 1 & 2 Vict. c. 110, s. 11, the sheriff delivers the *entirety* of the lands (including those of copyhold or customary tenure, and including also those over which the debtor has any general *disposing power*) (*d*); and by the 27 & 28 Vict.

(*z*) *In re Lawrence*, [1896] P. 244; *Lawrence v. Adams*, W. N. (96) 158.

(*a*) *Sherwood v. Clark*, 15 Mee. & W. 764; *Carter v. Hughes*, 2 H. & N. 714.

(*b*) 3 Bl. Com. 418.

(*c*) 2 Inst. 395; 29 Car. 2, c. 3.

(*d*) An *elegit* is always *returned* by the sheriff (that is, it is filed in court after execution),—so as to complete the tenant's title; and in this respect, it differs from a

fi. fa.,—although a *fi. fa.* also would be returned by the sheriff, if he was *ruled* to do so (Arch. Pr. 13th ed. 532). When it is returned upon an *elegit*, that land has been delivered to the plaintiff,—he is entitled at once, (subject to the estates of any parties which commenced before the judgment,) to enter upon such land, peaceably; or, if necessary, to recover it by action; on which issues the writ of possession (*habere facias*

c. 112, s. 4, every creditor to whom his debtor's land shall have been *actually delivered* in execution under a judgment, and whose writ or other process of execution shall be duly registered, may (during the time that such registry shall continue in force) obtain an order for the sale of his debtor's interest in such land (*e*); and such order, which used to be obtained only on petition, is now to be obtained, in general, on summons (*f*). But it is to be noted, that the writ of *elegit* is not now available for the seizure of *goods* in execution (*g*).

4. A CHARGING ORDER.—By the 1 & 2 Vict. c. 110, ss. 14, 15, and 3 & 4 Vict. c. 82, s. 1, on application of the judgment creditor, the property of the debtor in government stock, or in the stock of any public company in England (corporate or otherwise) may (by order) be *charged* with the payment of the amount of the judgment debt and interest,—so as to give the judgment creditor the same remedies as if the charge had been voluntarily made in his favour by the judgment debtor (*h*); but no proceedings may be taken on the judge's order, till after *six calendar months* from its date (*i*). The charging order may be obtained from a Divisional Court, or from a judge (*k*), or even (so far as it is *nisi*) from a master (*l*), or district registrar (*m*). The applicant for the order applies *ex parte*, for a rule to show cause (*n*); and a rule or order *nisi* is at once made, upon an affidavit identifying the stock or shares, and verifying the fact of the unsatisfied

possessionem); and only after such entry, or writ, is he *tenant by elegit*.

(*e*) *In re Bishop's Waltham Railway Co.*, Law Rep. 2 Ch. App. 382.

(*f*) Ord. lv. (Nov. 1893), r. 9b.

(*g*) 46 & 47 Vict. c. 52, s. 146.

(*h*) Ord. xlvi.; 5 Vict. c. 8.

(*i*) *Churchill v. Bank of England*, 11 Mee. & W. 323.

(*k*) Ord. xlvi. r. 1.

(*l*) Ord. liv. r. 12.

(*m*) Ord. xxxv. r. 6.

(*n*) 1 & 2 Vict. c. 110, s. 14.

judgment,—and also, of course, showing the right of the judgment debtor to the stock or shares (*o*): and the judgment debtor shows cause against the order *nisi*, within the time in that behalf appointed by the order; and if he fail, then, upon proof of service of the order *nisi*, that order is made absolute (*p*).

5. A GARNISHEE ORDER.—This order (like the charging order) is also an order *nisi* in the first instance (*q*), and is (in due course) made absolute (*r*); and the order (being, of course, duly served) charges (to the full extent of the judgment debt) all moneys belonging to the debtor in the hands of the garnishee, and all debts owing from the garnishee to the debtor (*s*),—the garnishee being any third person alleged to hold such moneys or to owe such debts; and if necessary for the purposes of discovery, the court will make an order against the judgment debtor for his examination before an officer of the court or special examiner (*t*). The effect of the service of the garnishee order *nisi* is to bind all such moneys and debts, as from the date of service (*u*); and if the garnishee do not appear to the order requiring him to appear and show cause against the order *nisi*,—or if he does not dispute the debt due or claimed to be due from him to the judgment debtor,—the order *nisi* is made absolute at once (*x*); but if he *bonâ fide* disputes the fact of

(*o*) 3 & 4 Vict. c. 82, s. 1.

(*p*) 1 & 2 Vict. c. 110, s. 15.

(*q*) Ord. xlv. r. 1; 17 & 18 Vict. c. 125, ss. 60—67; 23 & 24 Vict. c. 126, ss. 28—31; *Holmes v. Tutton*, 5 Ell. & Bl. 65; *Johnson v. Diamond*, 11 Exch. 431; *Dresser v. Johns*, 6 C. B. (N.S.) 429.

(*r*) Ord. xlv. rr. 3, 5; *Re Paice*, Law Rep. 4 C. P. 155; *Horsley v.*

Cox, *ib.* 4 Ch. App. 92; *Hall v. Pritchett*, 3 Q. B. D. 215.

(*s*) *Chatterton v. Watney*, 17 Ch. D. 229.

(*t*) Ord. xlii. r. 32.

(*u*) Ord. xlv. r. 2; *Sampson v. Seaton Railway Company*, Law Rep. 10 Q. B. 28; *Tapp v. Jones*, *ib.* 591.

(*x*) Ord. xlv. r. 3.

any moneys belonging to the judgment debtor being in his hands, or any debts being due from him to the judgment debtor, or he alleges some third person to be owner of or to have some lien on such moneys or debts (*y*), an issue will be directed to try the fact (*z*).

When the demand of the judgment creditor is satisfied, either by the voluntary payment of the debtor, or by this compulsory process, or otherwise, *satisfaction* ought to be *entered on record*,—to the end that the debtor may not be liable to be hereafter harassed, a second time on the same account (*a*).

VI. THE APPEAL.—The judgment obtained in the High Court, may, if erroneous, be relieved against in the *Court of Appeal* (*b*). Now, before the Judicature Acts, the method of setting right a final common law judgment, where the fault appeared by the record itself, was by

(*y*) Ord. xlv. rr. 4, 5.

(*z*) *Ibid.* r. 6.

(*a*) 23 & 24 Vict. c. 115, s. 2;
30 & 31 Vict. c. 47; Arch. Pr.
(13th ed.) 638.

(*b*) An erroneous judgment might also, formerly, have been redressed (or relieved from) on a writ of *attaint* (*vide sup.* p. 558); or on a writ of *deceit*; or on a writ of *audita querela*. A writ of *deceit* (abolished by the 3 & 4 Will. 4, c. 27, s. 36) was an action brought in the Common Pleas to reverse a judgment obtained in a *real* action, by fraud or collusion between the parties, to the prejudice of a third person. And a writ of *audita querela* was a writ for a defendant against whom judgment had been given,—but who was entitled to

be relieved upon some matter of discharge since the judgment, as a general release from the plaintiff, or payment of the debt sued for; and it stated, that the complaint of the defendant had been heard, *audita querela defendantis*; and set forth the matter of complaint; and enjoined the court to call the parties before them, and cause justice to be done; but by Ord. xlii. r. 27, no proceeding by *audita querela* shall now be used; but any party may apply summarily for a stay of execution or relief against a judgment, upon the ground of facts which have come too late to be pleaded (*Holmes v. Pemberton*, 1 E. & E. 367).

proceedings *in error* (c),—and in the case of a decision of the court in regard to an application for a new trial, or as to a point reserved (d), was by way of *appeal*; but the Judicature Acts abolished proceedings in error altogether, and substituted an appeal, in all cases, where the Court of Appeal had occasion to deal with what had taken place in the High Court. And these Acts have also given the Court of Appeal much more elastic powers than were exercised in the previous Courts of Error, having provided (in effect), that the Court of Appeal shall have all the powers and duties (as to amendment and otherwise) of the court of first instance,—with full discretionary power to receive further evidence (not raising an altogether new and inconsistent case) upon *questions of fact*, and generally to give such judgment as ought to have been given in the High Court (e). The Court of Appeal may also deal with any interlocutory order made in the action,—including (if leave be given by the court or judge making the order) orders as to discretionary costs, and orders made by consent (f). But (except by special leave) no appeal shall be made from an interlocutory order after the expiration of twenty-one (now fourteen) days, or any other

(c) Proceedings in error used, at one period, to begin by a *writ* sued out of the common law side of the Court of Chancery, addressed to the chief justice of the court in which the judgment was given, and commanding him to send a transcript of the record to the Court of Error; but, by 15 & 16 Vict. c. 76, s. 148, this writ was dispensed with in almost every case (*Arding v. Holmer*, 26 L. J. Exch. 72). There were errors *in fact*, and errors *in law*,—an instance of the first kind being, that the defendant being an infant appeared by solicitor instead

of guardian; and an error in law was founded on some mistake in law apparent on the face of the record, such as might have formed the subject of a demurrer.

(d) 17 & 18 Vict. c. 125, ss. 34, 35.

(e) Ord. lviii. r. 4. This includes the power of ordering a *new trial* (Ord. lviii. r. 5); and so, conversely, upon an application for a new trial, the Court of Appeal may treat the application as an appeal (Ord. xl. r. 10).

(f) 36 & 37 Vict. c. 66, s. 49.

appeal after the expiration of one year (now three months) (*g*),—and no appeal now operates as a *stay of execution*, or as a stay of proceedings under the judgment, order, or other decision appealed from, except so far as the court appealed from (or any judge thereof) or the Court of Appeal itself may direct (*h*).

And with regard to the manner of appealing, the Acts provide, that all appeals from the High Court of Justice to the Court of Appeal shall be by way of *rehearing* (*i*) ; and shall be brought by motion in a summary way, without petition, case, or other formal proceedings other than a notice of motion (*k*)—such notice being served upon all the parties directly affected by the appeal, and on them alone ; but the Court of Appeal may direct the notice of appeal to be served on any person (whether a party or not to the action), postponing or adjourning the hearing of the appeal in the meantime, upon such terms as shall be just (*l*). Also, all appeals from final judgments or orders are to be determined before not less than three judges of the court sitting together ; and all appeals from interlocutory orders, before two judges so sitting (*m*). And no judge of the Court of Appeal is to sit on the hearing of an appeal from himself (*n*).

Having now stated all the proceedings in an action from the commencement thereof by writ of summons to the conclusion thereof by judgment and execution thereon, or by appeal, it will be convenient to summarize the various steps or stages in the action, with the times appointed for each.

(*g*) Ord. lviii. r. 15 (as amended November, 1893).

(*h*) *Ibid.* r. 16. The rules also contain provisions with regard to *cross* appeals ; and with regard to the mode of bringing the evidence in the court below before the Court of Appeal (*ibid.* rr. 6, 11).

(*i*) Ord. lviii. r. 1.

(*k*) *Ibid.* r. 2.

(*l*) *Ibid.*

(*m*) 38 & 39 Vict. c. 77, s. 12.

(*n*) 36 & 37 Vict. c. 66, s. 52.

THE STEP.	THE TIME.
Defendant's appearance to writ of summons.	Within eight days after service of writ.
Statement of claim,—delivery of.	Within six weeks after appearance, — or along with writ of summons.
Statement of defence,—delivery of ;	Within ten days after delivery of statement of claim.
but, if to specially indorsed writ,—	Within eighteen days from service of writ.
or, if no statement of claim delivered.	Within ten days after appearance to writ.
Reply,—delivery of - - -	Within twenty - one days after delivery of defence.
Further defence and further reply.	Within eight days after the ground therefor has arisen.
Trial, notice of, delivery of ;	With reply, or within the twenty-one days for reply.
but, if given by defendant ;	After six weeks from pleadings closed.
or, if trial under Order XVIII.A. (<i>i.e.</i> , without pleadings).	Within ten days after appearance.
Trial, notice of, length of - -	Ten days; or (if short) four days ; or (if trial under Order XVIII.A.) twenty-one days.

THE STEP.	THE TIME.
Judgment on trial,—if trial of issue only,—motion for.	Within ten days (by plaintiff), — and afterwards (within one year from trial) by defendant.
New trial,—notice of motion for, —delivery of.	Within eight days after trial,—but (if elsewhere than in London or Middlesex) within seven days after last circuit day.
New trial,—notice of motion for, length of.	Fourteen days.
Appeal to Court of Appeal,—notice of motion for, delivery of:	
(1) from final order or judgment.	Within three months (<i>o</i>).
(2) from any other order -	Within fourteen days (<i>o</i>).
(3) from <i>ex parte</i> refusal -	Within four days.
Appeal to Court of Appeal, notice of motion for, length of :	
(1) in case of final order or judgment.	Fourteen days (<i>p</i>).
(2) in case of any other order.	Four days (<i>q</i>).

(*o*) The three months and the fourteen days reckon respectively from the date of the judgment or order being perfected, or (in case of refusal of order) from date of

refusal. (See *Re Helsby*, [1894] 1 Q. B. 742.)

(*p*) Cross-appeal—eight days.

(*q*) Cross-appeal—two days.

THE STEP.	THE TIME.
Appeal to Divisional Court,— notice of motion, delivery of:	
(1) if from inferior courts -	Within twenty - one days.
(2) if from chambers (r) -	Within eight days (in general).
Appeal to Divisional Court,— notice of motion, length of:	
(1) if from inferior courts -	Eight days.
(2) if from chambers - -	Four days (<i>semble</i>).
Execution on judgment,—issue of	Within six years.
Execution on judgment,—re- newal of.	Within one year after issue.

And as regards the various interlocutory applications in the course of an action,—*e.g.*, for interrogatories and inspection ; and for the amendment of pleadings, and the like,—there are divers times prescribed,—reckoning, in general, from some other step in the action ; and these times are, for the most part, extendible.

(r) Appeals (when they lie) in matters of practice and procedure are to the Court of Appeal ; Judicature Act, 1894, s. 1 (4).

CHAPTER XI.

OF PROCEEDINGS IN THE CHANCERY DIVISION.

WE shall now proceed to consider an action in the Chancery Division,—Firstly, where such action is commenced by writ of summons; and Secondly, where it is commenced by originating summons.

And firstly, where the *action* is commenced by writ of summons : There are all the same stages or steps in the action as we have just gone through in treating of an action in the Queen's Bench Division,—and there is really very little variation even in the matters comprised in (or which constitute or are incidental to) the successive steps or stages ; but there are some variations, and we must now consider these.

I. The PROCESS. — The writ of summons must be assigned by the plaintiff,—that is to say, the plaintiff must procure the cause to be assigned,—to one of the judges of the Chancery Division (*a*) ; and as regards the indorsements of claim required on every writ of summons, these vary with the almost infinite variety of the equitable relief that may be sought,—the specimens given in the Appendix to the Orders including claims as a creditor, or as a legatee (or as the case may be), to have the estate of one who is deceased administered ; or to have the accounts of certain partnership (or mortgage)

(*a*) Ord. v. rr. 5, 9 ; Ord. xlix.
The assignment is now by ballot
in the writ department before
issue of writ, and the plaintiff has

now no choice of judge. Ord. v.
r. 9 (see Yearly Supreme Court
Practice, p. 148).

transactions taken ; or that certain trusts may be carried into execution ; or that a certain deed may be set aside or rectified ; or for the specific performance of agreements, and the like (*b*) ; and it is specifically provided, that in all cases of ordinary account—as, for instance, in the case of a partnership, executorship, or ordinary trust account,—where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be expressly indorsed with a claim that such account be taken (*c*). And note, that in an action which is properly assigned to the Chancery Division, there is no judgment for default of *appearance* to the writ (*d*) ; but the plaintiff files the usual affidavit of service, and proceeds to deliver his statement of claim in the usual way. And with regard to the parties, one of several persons interested with others in an estate (as, for example, one of several residuary legatees or devisees, or one of several *cestuis que trustent*) may obtain an administration decree without serving the rest ; and in all cases of suits for the protection of property, one person may, in general, sue on behalf of himself and of all others having the same interest,—although the court may require any other persons to be made parties, as it may deem proper (*e*). Also, an unknown heir-at-law, “customary heir,” or unascertained next of kin, or an unborn co-tenant may, in any action involving a question of construction, be represented by a nominee defendant (*f*) ; and trustees, executors, and administrators represent] their respective beneficiaries, whether suing or being sued (*g*), although the court may at any time direct the beneficiaries to be joined as parties ; and the heir-at-law need not be made a party,

(*b*) See examples given in App. A. part iii. sect. i. ; also App. L.

(*c*) Ord. iii. r. 8 ; Ord. xxxiii. rr. 2—9.

(*d*) Ord. xiii. r. 12.

(*e*) 15 & 16 Vict. c. 86, s. 42 ; Ord. xvi. r. 39.

(*f*) Ord. xvi. r. 32.

(*g*) *Ibid.* r. 8.

unless the will is to be established against him (*h*) ; and one or more persons out of a numerous class having the same or the like interest may sue or be sued (or may be *ordered* to defend) on behalf of the entire class (*i*).

II. With regard to the PLEADINGS.—No special regulations for the Chancery Division exist with regard to these ; but it is obvious, that the statement of claim (and, indeed, the pleadings generally) must often, from the nature of the relief sought, be much more complicated and lengthy than those in an action in the Queen's Bench Division ; for example, in an action of foreclosure by A. against B., the statement of claim commences by shortly stating the mortgage under which A. claims, the amount which it was given to secure, and the rate of interest ; the title of A. is then shown, in case the mortgage was not made directly to him ; and the title of B. (as known to A.) is stated, in case the mortgage was not made by B. ; and, after alleging the sum lent to be still due with arrears of interest, the statement of claim proceeds to claim, that an account may be taken of what is due on such security to the plaintiff, and that the defendant may be *decreed* to pay the same (on a certain day to be appointed by the court) to the plaintiff, together with his costs of action—the plaintiff on his side offering, on being so paid, to convey the premises, as the court shall direct ; and further claiming, that, in default, the defendant may be *foreclosed* of his equity of redemption. And to such statement of claim, the defendant usually has no defence,—in which case, the pleadings are at an end forthwith ; but sometimes the defendant may, in his statement of defence, allege (1.) That the contents of the mortgage deed are not correctly stated in the statement of claim, alleging also that the sum advanced was less than that stated in the claim, and that

(*h*) Ord. xvi. r. 45.

(*i*) *Ibid.* r. 9.

the rate of interest was also lower ; or (2.) That he has, before action brought, repaid the sum due on the mortgage, together with all arrears of interest due thereon ; and on such a statement of defence, the plaintiff in his reply would join issue, and the pleadings would close. So, in an action for *specific performance*, the statement of claim would allege, *e.g.*, that the defendant agreed to grant a lease to the plaintiff, and has refused to do so ; and the defendant would, in such a case, state in his defence, that the plaintiff, having been let into possession, has broken one of the covenants of the proposed lease ; to which the plaintiff might reply, that he never in fact broke the covenant as alleged,—or that, if he did, such breach was waived by the defendant ; and under the present rules of pleading, the plaintiff is not required to anticipate, in his statement of claim, the case of the defendant (*k*). And note, that for default in *pleading*, judgment may be obtained in the Chancery Division, equally as in the Queen's Bench Division.

III. TRIAL AND EVIDENCE.—The party giving notice of trial in an action in the Chancery Division will prefer the matter to be disposed of by the judge himself without a jury ; and, in fact, a jury in the Court of Chancery has ever been an anomaly, and almost a fiction,—it having been the practice to send issues of fact to the courts at Westminster (or to the assizes) for the determination thereof, and to refer questions of *law* (as distinct from *equity*) to one of these courts for its opinion, the judges certifying their opinion into the chancery. But now, under the Judicature Acts, the practice is as follows, that is to say :—With regard to issues of *law*, the Chancery Division not only can (but must) decide these issues for itself ; and with regard to issues of *fact*, the occasions

(*k*) *Hall v. Eve*, Law Rep. 4 Ch. D. 341.

which arise under the new system for the intervention of a jury in actions assigned to the Chancery Division, are not much more frequent in number than before. And indeed all actions in the Chancery Division,—being actions which are of a nature exclusively appropriate to that Division,—are now to be tried by a judge without a jury (*l*),—unless the judge specifically orders a trial with a jury; and if the Chancery judge should order an action, or an issue of fact therein, to be tried before a judge with a jury, such trial is not had in the Chancery Division itself, but before the Queen's Bench Division sitting in Middlesex (or at the assizes); and although the order directing such trial must at one time have stated the reason for directing the action (or issue) to be so tried, that is not now necessary (*m*).

An important distinction is to be noticed with regard to the manner of giving evidence in an *action* (commenced by writ of summons) in the Chancery Division, and in matters brought forward in that division by way of *petition*, *summons*, or *motion*; for (in the absence of any written agreement between the parties) the evidence in every such action is given *vivâ voce*, as in the Queen's Bench Division (*n*); but on any petition, summons, or motion, the evidence may be (*and must be*) given by *affidavit* (subject to any order of the court on the application of either party for the cross-examination of the deponent). But as regards what is (and what is not) evidence, and as regards the admissibility of evidence, and as regards the weight of the evidence when admitted, and generally as regards all the rules of evidence, the Chancery Division is in entire agreement with the Queen's Bench Division.

(*l*) Ord. xxxvi. r. 3; *Swindell v. Birmingham Syndicate*, 3 Ch. D. 127; *Cardinall v. Cardinall*, 25 Ch. Div. 772; *Jenkins v. Bushby*, [1891] 1 Ch. 484.

(*m*) Ord. xxxvi. r. 4; *Warner v. Murdoch*, 4 Ch. D. 750; *Wood v. Hamblet*, 6 Ch. D. 113.

(*n*) Ord. xxxvii. r. 1; *Brooke v. Wigg*, 8 Ch. D. 510.

IV. THE JUDGMENT.—There is usually a very great difference between a Chancery judgment (or decree) and a Queen's Bench judgment,—the latter judgment being, usually, that this or that chattel be given up, or that such and such land or money or costs be recovered; whereas, in the Chancery Division, the judgment must be adapted to the nature of the relief prayed, the minutes thereof being taken down by the registrar, and being afterwards drawn up in the presence of the parties or their solicitors, and being ultimately (if need should arise) settled by the judge himself. Also, in the Chancery Division, before a final judgment can be given, it frequently happens, that long accounts have to be taken, incumbrances and debts inquired into, and a hundred other facts cleared up (*o*),—the investigation of all which matters may be referred to a referee, but is more usually conducted at chambers, before the chief clerks (now called the masters) (*p*); and in all these cases, the judge at the original hearing *adjourns the further consideration* of the action, until the accounts and inquiries directed to be gone into have been taken and made, and until the result thereof is reported to the court by the referee or (as the case may be) by the *chief clerk* (now, the *master*); and the judgment is afterwards given by the court, on the basis of such report, on the action being brought on for hearing on the further consideration which was adjourned (*q*).

And generally, upon any motion for judgment,—the due notice of which motion must have been given (filing the motion being, however, sufficient when the defendant has failed to appear to the writ),—the court may adopt one or other of two courses, namely: Firstly, If satisfied that it has before it all the materials necessary for finally determining the question or questions in dispute, it may give

(*o*) 3 Bl. Com. 453.

(*q*) Ord. xxxvi. r. 21.

(*p*) 36 & 37 Vict. c. 66, ss. 56, 57.

judgment accordingly (*r*); or, Secondly, If not so satisfied, the court may direct the motion to stand over for *further consideration*, and that in the meantime such issues or questions be tried, and such accounts and inquiries be taken and made, as it chooses to direct (*s*). And it is to be mentioned, that a very large proportion of actions in the Chancery Division assume this character, being set down as motions for judgment,—and usually for default of defence (*t*),—in order to take judgment thereon for accounts, inquiries, and the like without any trial; and almost invariably the further consideration of such actions is reserved; and many judgments in Chancery are obtained upon minutes of the proposed judgment passed between (and assented to by) the respective counsel; and other judgments are obtained by consent simply. And according to the practice in the Chancery Division, an action to be taken as short, must be so marked, and put in the “*short cause list*” accordingly,—a copy of the proposed judgment being at the same time left with the papers.

V. EXECUTION.—There were in use in the former Court of Chancery, special methods to enforce the performance of an order or decree,—that is to say, by *attachment* of the person, and by *sequestration* of the estate; and these two writs are (in the Judicature Rules) enumerated among the methods by which judgments of the High Court of Justice may be enforced, and they are directed to have the same effect as previously in the Court of Chancery. And these two special writs, although not usually applicable to an ordinary legal action,—wherein the usual judgment is only for the recovery of land or of money,—are much in use in the Chancery Division, to enforce the special judgments and orders of that Division,—for example, when the order directs the payment of

(*r*) Ord. xl. r. 10.

(*t*) Ord. xxvii. r. 11.

(*s*) *Ibid.*

money into court to the credit of an action, or is for the recovery of some property (other than land or money) withheld by the defendant, or requires anyone to do something (other than to pay money), or to abstain from doing something,—all such judgments are properly enforceable by one or other (and sometimes by both) of the two writs we have mentioned (*u*).

A *distringas* notice and a *stop-order* are also frequently met with in connection with Chancery proceedings. Now a *distringas* notice (in lieu of the old writ of *distringas*) is a notice served upon the Bank of England (or now on any company) (*x*) to stay the transfer of stock or shares in the bank (or company) (*y*) ; and the notice holds good for five years, unless it is sooner ended (which it is) by notice to the contrary, and the expiration of eight days thereafter (*z*),—and during the eight days, the party who served the *distringas* may apply for an injunction to stay the transfer. A *stop-order* is lodged against moneys or securities which are in court (Chancery Division),—and it is usually obtained by the assignee (whether by way of sale or of mortgage) of some beneficiary entitled to (or to some share in) the moneys or securities ; and the object of the *stop-order* is to prevent the funds being transferred without notice to the assignee (*a*).

For the purpose of enforcing a judgment, a receiver may be appointed in certain cases ; and this appointment is in the nature of *equitable execution* on the judgment debt (*b*),—and it is available when it is desired to obtain satisfaction of the judgment debt out of certain specific

(*u*) 47 & 48 Vict. c. 61, s. 14 ;
Ord. xlii. r. 30.

(*x*) Ord. xlv. r. 3.

(*y*) *Ibid.* r. 4.

(*z*) *Ibid.* r. 10.

(*a*) *Ibid.* r. 13 ; *Mutual Life v. Ingley*, 26 Ch. D. 686.

(*b*) *Harris v. Beauchamp Brothers*, [1894] 1 Q. B. 801 ;
Atkins v. Shephard, 43 Ch. Div 131.

property (real or personal) of the debtor, and the ordinary legal execution by *fi. fa.* or by *elegit* is not available,—or is not readily available,—in respect of that specific property (c). This mode of execution being, however, an expensive proceeding, it is not to be resorted to, unless where the amount of the judgment debt justifies, in some measure, the expense,—it not being “*just or convenient*” to incur such expense on a judgment for an inconsiderable amount; and the expense will, in a proper case, be limited (d). In all cases when a receiver is appointed by way of equitable execution, the appointment operates to charge the specific property,—that is to say, the judgment debtor’s interest therein; and consequently, the order appointing the receiver is,—and is expressed to be,—without prejudice to any existing charge or incumbrance on such property (e).

Secondly, actions in the Chancery Division may be commenced by *originating summons*,—an “*Originating summons*” meaning every summons other than a summons in a pending cause or matter; and proceedings by originating summons are very common in the Chancery Division of the court. For under Order LV., rule 3, executors (or administrators) and trustees may issue such a summons, as may also creditors (and the assignees of creditors) for obtaining relief of the nature or kind following, and that without a general administration of the estate or a general execution of the trusts, that is to say:—(1) The determination of any question affecting beneficiaries or creditors or persons claiming to be such; (2) The ascertainment of beneficiaries and creditors; (3) The taking of accounts by

(c) *Smith v. Cowell*, 6 Q. B. D. 78; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.

(d) Ord. l. r. 15A; Practice Rules (Q. B. Div.); Regulations

sanctioned by Q. B. D. judges, Yearly Supreme Court Practice, p. 446.

(e) *Underhay v. Read*, 20 Q. B. D. 209; App. K. Nos. 62, 63 (1883).

executors or administrators or by trustees ; (4) The payment into court of moneys in their hands ; (5) The direction and control of executors, administrators, and trustees ; (6) The approval of sales, purchases, compromises, &c.; and (7) Generally, the determination of any question arising in the administration of the estate or in the execution of the trust.

And where the executor or trustee is the applicant, he serves the summons on *the beneficiary or creditor* affected thereby (*f*) ; and if the applicant is the beneficiary or a creditor, or the assign of either, he serves his summons on the executor or trustee (*g*) ; and the *summons having* been duly issued and served, the day and hour for attendance are afterwards added in the margin, or at the foot thereof, at the chambers of the judge (*h*). The summons is supported by evidence,—such evidence as the nature of the application requires being adduced by affidavit in support of the application (*i*) ; and the judge, unless he should adjourn the matter into court (which he in many cases does), pronounces such judgment on the summons as he considers the nature of the application requires, adding any such special directions as he may think expedient (*k*).

Also, under Order LV. rule 5A, any mortgagee or mortgagor, whether legal or equitable, or any person entitled to a legal or equitable charge on property, or the person entitled to the property subject to such charge, may issue an originating summons, for such relief of the nature and kind following as is appropriate to the case, that is to say :—Sale, foreclosure, and delivery of possession by the mortgagor ; or redemption, re-conveyance, and delivery of possession by the mortgagee. And the parties to such a

(*f*) Ord. lv. r. 5.

(*g*) *Ibid.*

(*h*) *Ibid.* rr. 20, 21.

(*i*) *Ibid.* r. 7.

(*k*) *Ibid.* rr. 8, 9.

summons will be all the persons who (in an ordinary foreclosure or redemption action commenced by writ) would have been the proper parties (*l*) ; and the summons is issued and served, and the evidence in support thereof is adduced, and the summons itself is heard and disposed of, and judgment thereon given, exactly as upon an originating summons issued under Order LV. rule 3.

And under other rules,—supplementary to Order LV.,—other relief of the like general character may be obtained, *e.g.*, disputes under the Finance Act, 1894 (*m*), may be so determined (*n*).

(*l*) Ord. lv. r. 5B.

(*n*) Ord. lv. r. 9C (Nov. 1895).

(*m*) 57 & 58 Vict. c. 30.

CHAPTER XII.

OF PROCEEDINGS IN THE PROBATE, DIVORCE, AND
ADMIRALTY DIVISION.

It is necessary, in treating of the proceedings in this Division, that we should treat separately,—I. Of a Probate Action ; II. Of a Divorce Petition ; and III. Of an Admiralty Action,—it being understood that, unless where the contrary is stated, the course of an action is the same in this Division as in the Queen's Bench Division.

I. PROBATE ACTION.—The business relating to probate and administration, originally transacted in the Ecclesiastical Courts, and afterwards in the Court of Probate created by the 20 & 21 Vict. c. 77, and subsequently transferred to the High Court of Justice, and assigned to the Probate Division, was twofold in its character—one being *non-contentious*, and the other *contentious*. Of the non-contentious business (otherwise termed the *common form business*) (*a*), and of the practice therein, we do not propose to take any specific notice, as it consists chiefly of matters of detail, which must be sought in the books of practice (*b*) ; but we may state generally, that it comprises the grant of probate or administration by the court, through the medium (in general) of the principal registry or of the district registries, in respect of the

(*a*) Common form (or non-contentious) business includes the *warning of caveats* entered against

a grant of probate or administration (20 & 21 Vict. c. 77, s. 2).

(*b*) Coote's Common Form Practice, by Tristram.

personal property *in England* which belonged to anyone (whether a British subject or not) at the time of his or her death (c) ; and this non-contentious jurisdiction has not been affected by the Judicature Acts (d).

Proceeding to the *contentious* business of the Probate Division :—If any one (*e.g.*, any next of kin) who has an interest in the estate of a deceased person desires to oppose the grant of probate or of letters of administration, he must enter a “caveat” in the principal registry, or in the proper district registry. A “caveat” is a formal notice to the registry of the court, demanding that nothing be done in the goods of the deceased unknown to him who takes out the caveat, inasmuch as he is a party interested in the estate (e). He, therefore, who is desirous that a grant may issue, “warns the caveat”; *i.e.*, the court at his instance warns him who took out the caveat, that unless he within six days “enters an appearance” to the caveat he has taken out, and therein sets forth his interest in the estate, the court will nevertheless proceed in the matter. Upon this appearance being entered, the matter is entered as a cause in the court book, and the “contentious business” is held to have thereupon commenced (f). He who took out the caveat then issues a writ, having first filed an affidavit verifying the endorsement on the writ. A citation is also sometimes necessary; and the citation is, in general, a command issuing from the principal registry, ordering the party against whom it issues, and on whom it must be served, to do what is required of him,—as, for example, to accept or refuse probate or administration, or to bring in the probate

(c) *In the Goods of Coode*, Law Rep. 1 Prob. & Div. Ca. 449. *Kennaway v. Kennaway*, 1 P. D. 14.

(d) *Peacock v. Lowe*, Law Rep. 1 Prob. & Div. Ca. 311; and (e) R. 72, N. C. B.

(f) R. 12, C. B.

or administration which the court has already granted ; or it may be simply “to see proceedings,” *i.e.*, to become a party to a suit, in order that the decree of the court may be binding on him. If the action is for revocation of probate, then it is the practice not only to extract a citation, but also to issue a writ ; for, by Order I., rule 1 of the Supreme Court Rules, “All actions which previously to the commencement of the Principal Act [*i.e.*, the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66)] were commenced by . . . citation or otherwise in the Court of Probate, shall be instituted . . . by a proceeding to be called an action” ; and by sect. 100 of the Principal Act, “action” shall mean a civil proceeding commenced by writ. But by Order I., rule 2, “All other proceedings . . . may be taken in the same manner as they would have been taken if (the Principal Act and its amending Acts) had not been passed” ; and by Order II., rule 1, “Every action . . . shall be commenced by writ of summons, which shall be indorsed with a statement of the nature of the claim.” Although Order XVI., rule 11, provides, that the court may order the striking out or adding of parties at any stage of the proceedings, yet it has been held that this rule has in no way affected the practice of the Probate Division as to the citing of persons (*g*). Hence arises the practice of issuing a writ and also a citation ; and every suit for revocation of a grant of probate or administration commences with a citation, which should be extracted before or concurrently with the writ of summons.

In an action by an executor or legatee propounding a will in solemn form, the indorsement on the writ states, that “the plaintiff claims to be the executor of the last

(*g*) *Kennaway v. Kennaway*, 1 P. D. 148.

will dated the day of 18 , of John Doe, gentleman, who died on the day of 18 , and to have the said will established.” It must, however, further state, in what capacity the defendants are made defendants,—*e.g.*, “This writ is issued against you as one of the next of kin” of the said deceased; or in whatever other capacity it may happen to be. After the writ and citation, there follow the pleadings; and in order to obtain a general idea of the pleadings, we will suppose, that the statement of claim (which is the first pleading) sets forth the due making and execution of his last will by the testator, he being at the time of sound disposing power, and the due attestation of such will, whereby the plaintiff was appointed sole executor of the will; and we will suppose that the statement of claim then proceeds to claim (as it will do), that the court may decree probate of the will in solemn form. Now to such a statement of claim, the defendant will (in his statement of defence) raise all or any of the following defences, that is to say:—(A.) That the will was not duly executed according to law, *i.e.*, according to the provisions of the Wills Act (1 Viet. c. 26); (B.) That the deceased, at the time of the execution of the will, did not know and approve of its contents; (C.) That the deceased, at the time when the will purports to have been executed, was not of sound mind, memory, and understanding; and (D.) That the execution of the will was obtained by the undue influence of the plaintiff. And the defendant may (and often does) allege, by way of counter-claim, that he is the executor of a later will of the deceased than that which the plaintiff is propounding; and in that case, he prays, that the plaintiff’s will may be pronounced against, and that probate of the will which he is setting up may be granted in solemn form of law.

And we may here conveniently observe, that with regard

to the testator's capacity to make a will, three essentials are requisite : (1.) He must understand the nature of his act and its effects ; (2.) He must understand the extent of the property that he is disposing of ; and (3.) He must be able to comprehend and appreciate the claims to which he ought to give effect (*h*). And as regards the testator's being of sound mind, memory, and understanding,—the law holds that the mere fact of a man having an insane delusion does not *ipso facto* deprive him of his disposing power ; that is to say, if the delusion has not influenced him in the disposal of his property, he is, notwithstanding his malady, deemed competent to make a will (*i*).

And as regards the defence of “*undue influence*,” it does not follow that, because one person has unbounded influence over another, that therefore (when it is exercised) it is “*undue*” in the legal sense of the word,—*e.g.*, “A young man may be caught in the toils of a harlot who makes use of her influence to induce him to make a will in her favour to the exclusion of his relatives ; and a man so entangled will naturally yield to that influence, and confer large bounties on the person with whom he has been brought into such relations ; yet the law does not attempt to guard against those contingencies. To be undue influence in the eye of the law there must be— to sum it up in a word—coercion (*k*). A testator may be led but not driven ; and his will must be the off-spring of his own volition and not the record of someone else's. Pressure of whatever character, whether acting on the fears or the hopes, *if so exerted as to overpower the volition without convincing the judgment*, is a specimen

(*h*) *Banks v. Goodfellow*, L. R.
5 Q. B. at p. 565.

(*k*) *Wingrove v. Wingrove* 11
P. D. 81, *per* Hannen, J.

(*i*) *Boughton v. Knight*, L. R.
3 P. & D. 64.

“ of restraint under which no valid will can be made.
 “ Importunity or threats such as the testator has not
 “ courage to resist, moral command asserted and yielded
 “ to for the sake of peace and quiet or of escaping from
 “ distress of mind or social discomfort, these, *if carried*
 “ *to a degree in which the free play of the testator’s judg-*
 “ *ment discretion or wishes are overborne*, will constitute
 “ undue influence, though no force is either used or
 “ threatened ” (*l*).

And on these or similar defences, issue will be joined,—unless the plaintiff should (as he may) go on to allege, in his reply, that the earlier will set up was afterwards revoked (*m*). But sometimes the defendant, in his defence, will merely insist upon the will set up being proved in solemn form of law,—intimating to the plaintiff, that he only intends to cross-examine the witnesses produced in support of the will (*n*).

By leave of the court or a judge, the writ of summons may be served out of the jurisdiction (*o*) ; and anyone not named in the writ may, on filing an affidavit showing how he is interested in the estate, *intervene* and appear in the action (*p*). If the defendant makes default in pleading, the probate action proceeds notwithstanding such default (*q*). If the case has been heard, the application for a rehearing must be to the Court of Appeal ; and an appeal lies to the Court of Appeal, on the facts as well as on the law (*r*) ; but if the trial is with a jury, and the direction of the judge is objected to as bad in law,—then the

(*l*) *Hall v. Hall*, L. R. 1 P. & D. 481 ; *per* Wilde, J.

(*m*) *Parton v. Johnson*, Law Rep. 1 Prob. & Div. Ca. 549.

(*n*) Ord. xxi. r. 18.

(*o*) Ord. xi. r. 3.

(*p*) Ord. xii. r. 23.

(*q*) Ord. xxvii. r. 10.

(*r*) *Sugden v. Lord St. Leonards*, 1 P. D. 154.

matter is brought before the Court of Appeal by way of *exception* to such ruling (s),—which is, in reality, like any ordinary appeal.

II. DIVORCE PETITION.—The proceedings in divorce and matrimonial causes are commenced by the filing of a petition, which is addressed to the President of the Probate Divorce and Admiralty Division. The petition sets out, shortly and concisely, when and where the parties were married, and where they have cohabited; and states what issue there has been of the marriage. The matrimonial offences relied on, with the dates when, and the places where, they were committed, are then tabulated in paragraphs in chronological order; and the petition concludes with a prayer for the relief sought for by the petitioner. The petition must be verified by affidavit; and the petitioner must swear to the truth of the statements in his petition in so far as they are within his personal knowledge, and to his belief in the truth of those that are not (t). In suits for dissolution, judicial separation, jactitation, and nullity of marriage, the petitioner must further swear, that no collusion or connivance exists between him and the respondent (u). So soon as the petitioner has filed his petition and affidavit he must forthwith “extract a citation” (x), a citation being a command, drawn in the name of the Sovereign and signed by one of the Registrars of the Court, calling upon the alleged offender to appear and make answer to the petition; and it warns him that, in default of his so doing, sentence will be pronounced notwithstanding his absence. The citation must be served personally; or, if that cannot be done, application must be made to the court (by motion founded on affidavit) for leave to dispense with service (y).

(s) *Cheese v. Lovejoy*, 2 P. D.

(u) Rule 3.

(x) Rule 8.

(t) Rule 2.

(y) Rules 10—13.

If the petition be presented by a husband praying for a dissolution of his marriage on the ground of adultery, the alleged adulterers must be made co-respondents,—unless the court gives leave to proceed without making them co-respondents, which it will do on its being moved by the petitioner, and on being satisfied that he has been unable to effect personal service (z). The husband may also claim damages against the adulterers; but such damages are not awarded by way of a penalty to punish the adulterer for the wrong he has done, but are by way of compensation to the petitioner for the loss he has sustained (a) by the ruination of his wife; and hence the jury must consider what was the value of the wife to the petitioner.

In all cases where damages are claimed, the petition must be tried by a jury, on whom falls the duty of assessing the amount. The petitioner may claim what amount of damages he thinks fit; but it is not the practice to allow the counsel for the petitioner to inform the jury what that amount is; and in case the jury assess a greater sum than that which the petitioner claimed, the court will generally grant leave to amend the prayer in that respect. The manner in which the damages shall be paid or applied is subject to the directions of the court; and if the court thinks fit, it may order the whole of the damages, or any part thereof, to be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife (b). Within the prescribed time after the service of the petition, each respondent who has “entered an appearance,”—i.e., has caused to be notified (in the court book provided for the purpose) the fact that he “appears,” meaning thereby that he is desirous of having the option

(z) Rules 4—7; *Appleyard v. Appleyard and Smith*, Law Rep. 3 P. & D. 259.

(a) 20 & 21 Vict. c. 85, s. 33.

Cowing v. Cowing and Wollen, 33 L. J. P. D. & A. 149.

(b) Sect. 33.

of defending the suit,—may file in the registry an answer to the petition (*c*); and if such answer contain matter other than a simple denial of the facts stated in the petition, an affidavit must be filed with it verifying the additional matter; and if it is an answer to a petition for dissolution, nullity, judicial separation, or jactitation, the affidavit must further state, that there is not any collusion or connivance between the deponent and the petitioner (*d*). In cases where the answer is more than a simple traverse (*i.e.*, denial) of the allegations, the petitioner admits, or puts in issue, the fresh facts therein alleged by filing a reply (*e*).

And here it will be convenient to refer more specifically to the defences available in the suit for a divorce: which defences are eight in number, and are either (1.) *Absolute Bars*; or (2.) *Discretionary Bars*. And, Firstly, the Absolute Bars are (A.) Condonation; (B.) Connivance; and (C.) Collusion (*f*).

(A.) By “condonation,” is meant forgiveness of the conjugal offence complained of, with a full knowledge of all the circumstances; and a continuance of the marital intercourse would justify the inference that the offence had been condoned (*g*).

(B.) By “connivance,” is meant the actual acquiescence in the respondent’s guilt by the petitioner (*h*).

(C.) By “collusion,” is meant the entering into an agreement by the parties to the suit, as to what evidence shall or shall not be laid before the court; for example, to

(c) Rules 19—28.

(d) Rules 30, 31.

(e) Rules 32, 33.

(f) 20 & 21 Vict. c. 85, s. 31.

(g) *Peacock v. Peacock*, 1 Sw. &

Tr. 184; *Keats v. Keats and Monteguma*, 28 L. J. P. D. & A. 57.

(h) *Phillips v. Phillips*, 1 Robert. 145; *Allen v. Allen and D’Arcy*, 30 L. J. P. D. & A. 2.

agree that the respondent shall abstain from defending the suit constitutes collusion (*i*). If, therefore, a respondent or co-respondent proves the condonation or connivance of the petitioner, or are themselves found to be in collusion with him, the court can not grant a decree.

Secondly, the Discretionary Bars are (D.) The unreasonable delay of the petitioner in presenting or prosecuting his petition; (E.) The cruelty of the petitioner to the respondent; (F.) The desertion or wilful separation without reasonable excuse of the petitioner from the respondent, prior to the misconduct complained of; (G.) The wilful neglect or misconduct of the petitioner, which has conduced to the respondent's adultery; and (H.) The adultery of the petitioner (*k*).

Now, (D.) By "unreasonable delay" is meant a delay of two years; and unless a satisfactory explanation can be given of it, it disentitles the petitioner to a divorce (*l*). Want of means, however, is considered a satisfactory explanation (*m*).

(E.) By "cruelty" is meant such conduct as results in bodily hurt or injury to health, or a reasonable apprehension of one or other of these (*n*). The principle on which the court exercises its discretion in favour of, or adversely to, a petitioner who is found guilty of cruelty towards the respondent, is to ask itself, whether such cruelty has or has not been the cause of the misconduct complained of in the respondent (*o*).

(*i*) *Churchward v. Churchward*, [1895] P. 7.

(*k*) 20 & 21 Vict. c. 85, s. 31.

(*l*) *Nicholson v. Nicholson*, L. R. 3 P. & D. 53; *Beauclerk v. Beauclerk*, [1895] P. 228.

(*m*) *Harrison v. Harrison*, 33 L. J. P. D. & A. 44.

(*n*) *Per* Lord Herschell in *Russell v. Russell*, [1897] App. Cas. p. 456.

(*o*) *Pearman v. Pearman and Burgess*, 29 L. J. P. D. & A. 54.

(F.) As regards desertion, when pleaded as a bar to divorce, it is not necessary that the desertion should have continued for the space of two years or for any specific period (*p*); the act relied on as desertion must, however, in all cases have been done in opposition to the wishes of the person who alleges it (*q*).

(G.) With regard to the wilful neglect or misconduct of the petitioner, the principle on which the court acts is, that it must directly conduce to the adultery complained of; for many circumstances are conceivable which may indirectly conduce to that,—which would be insufficient (*r*).

And (H.) With regard to the adultery of the petitioner, the court will only overlook his misconduct so as to grant him a divorce in three classes of cases:—Firstly, where there has been a mistake of law (*s*); Secondly, where there has been a mistake of fact (*t*); and Thirdly, under special circumstances (*u*).

Moreover, in all cases for divorce, before the court proceeds to grant the relief a petitioner seeks, it must be satisfied, that he is domiciled within the jurisdiction of the court,—*i.e.*, that he has within the jurisdiction a fixed permanent home, and one to which, when absent from it, he intends to return; for the court is a court for England only,—not a court for the United Kingdom or Great Britain—and for the purposes of jurisdiction, Ireland and Scotland are deemed to be foreign countries equally with France or Spain (*x*). So, likewise, the Channel

(*p*) *Williams v. Williams*, 33 L. J. P. D. & A. 173.

(*q*) *Ward v. Ward*, 27 L. J. P. D. & A. 63.

(*r*) *Badcock v. Badcock*, 31 L. T. 268.

(*s*) *Noble v. Noble*, L. R. 1 P. & D. 691; *Moore v. Moore*, [1892] P. 382.

(*t*) *Joseph v. Joseph and Wentzell*, 34 L. J. P. D. & A. 96.

(*u*) *Morgan v. Morgan and Porter*, L. R. 1 P. & D. 644.

(*x*) *Yelverton v. Yelverton*, 1 Sw. & Tr. 586; *Le Mesurier v. Le Mesurier* [1895], A. C. 517.

Islands (*y*) and the Isle of Man (*z*) are not within the jurisdiction.

Where the attendance of the witnesses can be procured, they are examined *vivâ voce* in open court at the time the petition is heard ; though,—in certain cases, and subject to the opportunity being given for the cross-examination and re-examination of the deponent in open court,—the case of either party may be verified by affidavit ; and under certain circumstances, the evidence of any particular witness may be taken under a commission, and such evidence made admissible at the trial (*a*).

The court has power to make orders on a husband for the payment of alimony to the wife ; and a wife who is desirous of obtaining such an order must file a petition for the purpose ; but if she is the petitioner in the cause, the petition for alimony must not be presented before the citation has been duly served upon the respondent ; if, however, she is respondent in the cause, she may file it so soon as she has entered an appearance (*b*). The husband may then file an answer upon oath, setting out what his means are ; and the matter is then dealt with by the registrar of the court. If a wife has means of support independently of her husband, she is not entitled to an allotment of alimony,—and this even though that support is derived from the co-respondent (*c*). The amount allotted is discretionary, the circumstances of each case being considered ; but generally one-fifth of the joint income is allotted as alimony *pendente lite*, and one-third for permanent alimony.

(*y*) 4 Inst. 286.

(*z*) *Davison v. Farmer*, 20 L. J. Ex. 177.

(*a*) Rules and Regulations, 1865, rr. 51—55.

(*b*) Rules 81—90.

(*c*) *Holt v. Holt and Davis*, L. R. 1 P & D. 610.

And with reference to the mode of trial, the registrar will, on due application, as soon as the pleadings are concluded, direct whether the action shall be tried by a jury or before the court itself, and whether by oral evidence or by affidavit (*d*) ; but in cases of *divorce*, the trial must be in open court, and not in *camerâ* (*e*) ; and either party may insist on a jury.

When an issue is to be tried either by a special or by a common jury, the record is settled by the registrar, and the case set down for trial by the petitioner ; or, in his default, this step may be taken by the respondent (*f*) ; and the trial takes place, in general, like the trial before a jury of an issue of fact in an ordinary action.

And with regard to appeals from the decree, the decision of the judge ordinary (which used to be to the “full court” of judges as established by the 20 & 21 Vict. c. 85 and 23 & 24 Vict. c. 144, and not to the Court of Appeal established under the Judicature Acts) (*g*), is now to the Court of Appeal, as in ordinary appeals (*h*),—there being, moreover, an ultimate appeal (in the case of a divorce suit, or for nullity of marriage) to the House of Lords (*i*).

The Queen’s Proctor, or any other person, wishing to show cause against making absolute a decree nisi for a divorce—which we may remember is always the form of the decree given on a petition for the dissolution of a marriage—may enter an appearance, together with an affidavit of the facts on which he relies ; to which

(*d*) Rules and Regulations, 1865, r. 40.

(*e*) Law Rep. 1 Prob. & Div. Ca. 640.

(*f*) Rules and Regulations, 1865, r. 46.

(*g*) *Westhead v. Westhead*, 2

P. D. 1 ; *Gladstone v. Gladstone*, *ibid.* 143.

(*h*) Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 9.

(*i*) 20 & 21 Vict. c. 85 s. 56 ; 44 & 45 Vict. c. 68, s. 9.

the party in whose favour the decree nisi was given may file affidavits in reply,—when the questions raised on such affidavits are argued before the judge ; and if the judge shall so direct, any controverted question of fact may be tried before a jury (*k*). But if, at the expiration of six calendar months, no person has appeared to oppose the decree, application may then be made to the judge to make such decree absolute (*l*) ; and if no application to make the decree absolute be made within a reasonable time, the respondent is entitled to apply to have the decree nisi revoked, and the petition dismissed for want of prosecution (*m*).

During the progress of the cause, any person may give information (to her Majesty's proctor) of any matter material to the due decision of the case ; and the Queen's proctor may thereupon take such steps as the attorney-general may think necessary or expedient, and may, by leave of the court, *intervene* in the suit ; and if he does so, he enters an appearance himself to the petition, and pleads collusion between the parties,—on which plea, an issue is raised and disposed of between himself and the petitioner ; and this course may be taken at any time before the decree has been made absolute (*n*).

III. ADMIRALTY ACTION.—This action is regulated by the rules in force in the old Court of Admiralty, modified, however, by the rules laid down under the Judicature Acts with regard to actions generally, some of which apply, in particular, to admiralty actions *in rem* (*o*) ; and

(*k*) Rules and Regulations, 1865, rr. 70—76.

(*l*) *Ibid.* r. 80.

(*m*) *Ousey v. Ousey*, 2 P. D. 56.

(*n*) 23 & 24 Vict. c. 144, s. 7 ;
Le Sueur v. Le Sueur, 2 P. D. 79.

(*o*) The former rules of *pleading* in the Admiralty Court are wholly superseded (Ord. xix. r. 1).

in an admiralty action *in personam*, the proceedings do not differ materially from the proceedings in an action in the Queen's Bench Division. As regards the action *in rem*, at any time after the writ of summons has issued, a warrant is also to issue, commanding the marshal of the court, or his substitute—or the collector of customs at such and such a port—to *arrest* the ship in respect of which the claim is made,—or her cargo and freight,—and to keep the same until further order (*p*). The warrant, however, must be preceded by an *affidavit*, setting forth certain particulars prescribed by the Orders, and which vary according to the nature of the claim ; but in all cases, such particulars disclose the nature of the claim, and the name and description of the party on whose behalf the action is instituted, and allege that the claim has not been satisfied (*q*). The defendant may,—upon giving bail to the action,—cause a *caveat* to be entered against the arrest (*r*).

In an admiralty action *in rem*, the service of the writ is effected by nailing or affixing the writ itself on the mast of the vessel, or on the cargo, if removed from the ship,—which service is in lieu of the personal service required in other actions (*s*).

If no appearance to the writ of summons was entered, then, in cases where no property was claimed in the *res*, and it had been arrested, it might be sold after notice and the proceeds brought into court,—or if the property therein was claimed, the possession thereof might be decreed in the defendant's absence (*t*) ; and *if the defendant appeared, but failed to deliver a statement of defence*, the

(*p*) Ord. v. r. 16 ; App. A.
part i. No. 17.

(*q*) Ord. v. r. 16.

(*r*) Rules, 1854, rr. 55—61.

(*s*) Ord. ix. rr. 11, 12.

(*t*) *The Polymede*, 1 P. D. 121.

plaintiff's course was to "deliver a conclusion," and to set down the action for hearing (*u*). But, under the present practice (*x*),—(1) *For default of appearance*, if (when the action comes before him) the judge is satisfied that the plaintiff's claim is well founded, he may pronounce for the claim, with or without a reference to the admiralty registrar,—or to such registrar assisted by merchants,—and may at the same time order the property to be appraised and sold,—with or without previous notice,—and the proceeds to be paid into court; and (2) *For default of pleading*, the practice appears to be as in an ordinary action (*y*).

Again, in an admiralty action *in rem*, any person not named in the writ of summons, may *intervene* and defend the action, on filing an affidavit showing either that he is interested in the *res* under arrest; or (should the arrest be taken off,—as it may be, on sufficient money being paid into the registry of the court to satisfy the claim and costs) that he is interested in the fund so paid in (*z*).

In the particular case of an action for "*damage by collision*" between vessels, the solicitors on either side are required to file in court a sealed up document called a "*preliminary act*," before the delivery of any pleadings,—which preliminary act contains a statement as to certain facts with reference to the description of the vessels, and the circumstances of the collision,—and it may, with the consent of both parties, be opened, and the evidence taken thereon by order of the court or a judge, without the

(*u*) *The Sfactoria*, 2 P. D. 3;
Rules, 1859, rr. 75, 80, 105.

(*y*) Ord. xxvii. r. 11.

(*z*) Ord. xii. r. 24.

(*x*) Ord. xiii. r. 13.

necessity of delivering any pleadings in the action (*a*),—the object of this rule being to obtain a statement of the facts as soon as possible after the collision has taken place, so as to prevent either party from afterwards varying his version of the facts, in order to meet the allegations of his opponent (*b*).

In admiralty actions, whether *in rem* or *in personam*, the court or a judge may, at any stage of the proceedings, on application by either party, call on the other to show cause, why the trial should not take place at some early day to be appointed; and for that purpose, the court may dispense with notice of trial, and may otherwise vary the usual regulations as to bringing on an action for trial (*c*). The trial in admiralty actions is almost invariably before the judge alone, or before the judge sitting with two of the Trinity masters as assessors to advise him on questions of a nautical character,—though the decision given is that of the judge himself; and it is not usual to have recourse to a jury; but should one of the parties ask for a jury, he is entitled to have one,—unless the other party asks for assessors; in which case the trial must be by judge and assessors (*d*).

In an admiralty action tried before the judge, the court does not itself,—any more than does the judge in a chancery action,—enter into matters of detail relating to the assessment of damages or matters of account; and whenever, in the course of a trial, it becomes necessary that the court should be informed upon such questions, it has always been usual to direct a reference to the registrar, assisted by merchants (*e*),—a practice which, however,

(*a*) Ord. xix. r. 28; *The Why Not*, Law Rep. 2 Prob. & Div. Ca. 265; *The Godiva*, 11 P. D. 20.

(*b*) Williams & Bruce's Ad. Prac. p. 253.

(*c*) Ord. lxiv. r. 9.

(*d*) *The Tynwald*, [1895] P. 142.

(*e*) Rules, 1859, rr. 107—118.

must be now taken as subject, in the general case, to the power of the court to direct inquiries, and to make orders of a cognate nature, conferred by the Judicature Acts.

And, finally, with regard to the *appeal* in an admiralty action, that lies to the Court of Appeal, as in an ordinary action in the Chancery Division of the High Court; and there is an ultimate appeal to the House of Lords,—or (*semble*) in certain cases, to the Privy Council; but where the judge ordinary has come to a conclusion of fact after hearing witnesses, his decision will not be reversed, except under very exceptional circumstances (*f*).

(*f*) *The Glannibanta*, 1 P. D. 283; *The "P. Caland,"* [1893] A. C. 207.

CHAPTER XIII.

OF PROCEEDINGS AFFECTING THE CROWN.

WE have now to consider the manner of redressing civil injuries, in cases where the crown (either as the aggressor or as the sufferer) is concerned ; and we shall consider, firstly, those injuries which a subject may suffer from the crown ; and, secondly, those which the crown may sustain from a subject.

I. INJURIES BY THE CROWN.—Although the sovereign can in his own person do no wrong, yet his acts may in themselves be contrary to law ; and whenever, by misinformation or inadvertence, the sovereign hath been induced to invade the private rights of the subject, and becomes (upon a due representation) informed of the injury sustained,—the law always then presumes, that to know of the injury and to redress it are inseparable in the royal breast ; and issues, as of course, in the sovereign's own name, an order to his judges to do justice to the party aggrieved (*a*).

The distance between the sovereign and his subjects is such, that it rarely can happen that any injury to the *person* can proceed from the prince to any private man,—and the law in decency supposes, that such injury never can or will happen at all ; but injuries to a private individual's right of *property* may be committed by the crown, though scarcely without the intervention of its

(*a*) 3 Bl. Com. p 255.

officers ; and for these officers the law, in matters of right, entertains no respect or delicacy, but furnishes various methods of detecting their errors or misconduct (*b*). But inasmuch as, in ordinary cases, the sovereign himself is the medium through which justice is obtained, so no relief can be had against the crown,—by *action* (*c*) ; therefore the relief is obtainable only by means of such special forms of proceeding as the law has provided in that behalf,—although, of course, where the rights of the crown are only incidentally concerned, the attorney-general, being made a party to the proceeding, sufficiently represents the crown,—*e.g.*, in the case of a charity (*d*).

[The method of obtaining possession or restitution from the crown, of real or personal property (*e*), is by petition of right (*petition de droit*) (*f*),—which remedy is applicable when the crown is in possession of any hereditaments or chattels, and the petitioner suggests such right as controverts the title of the crown, grounded on facts disclosed in the

(*b*) 3 Bl. Com. p. 255.

(*c*) Jenkins, 78 ; Finch, L. 83 ;
Bac. Ab. Prerog. E. 7.

(*d*) *Balch v. Wastall*, 1 P. Wms. 445 ; *Reeve v. Attorney-General*, 1 Ves. 445 ; *Simpson v. Clayton*, 4 Bing. N. C. 766 ; 2 Roll. Abr. 213 ; Mitf. Treat. on Pleading in Chancery ; Ord. xxxviii. r. 36.

(*e*) Neither an action for damages nor a petition of right lies, to recover compensation for a *tort* (or wrongful act) done by a servant of the crown in the supposed performance of his duties (*Tobin v. The Queen*, 16 C. B. (N.S.) 310) ; but it is otherwise for a breach of contract (*Thomas v. The Queen*, Law Rep. 10 Q. B. 31 ; *Kinloch v. Secretary of State for India*, 7 App. Cas. 619 ; *The Windsor*

(*Canada*) *Rail. Co. v. The Queen*, 11 App. Ca. 607).

(*f*) There was also another writ against the crown, called a *monstrans de droit*, and which was applicable where the crown was in possession under a title the facts of which were already set forth on record ; and Blackstone says (vol. iii. p. 256), that, by this writ, the process on which was speedier and cheaper than the process on *petition*, and which was enlarged and improved by the 36 Edw. 3, c. 13 and 2 & 3 Edw. 6, c. 8, the petition of right became almost superseded. (See also 4 Rep. 55 ; Bac. Ab. tit. Prerog. E. 7 ; Co. Entr. 402 ; Skin. 608 ; Chitty on the Prerogative.)

[petition itself,—the petitioner stating truly *the whole title of the crown*, otherwise the petition shall abate (*g*). And then, upon this answer, “*soit droit fait al partie*”—*let right be done to the party*—being endorsed or underwritten by the crown (*h*), a commission issues to inquire into the truth of the suggestion (*i*) ; after the return to which, the attorney-general is at liberty to plead ; and the merits are afterwards determined upon some issue of fact or of law, as in actions between subject and subject. For example, if a disseisor of lands which are holden of the crown dies seised and without any heir, whereby the crown is *primâ facie* entitled to the lands, and the possession is cast on it, either by inquest of office, or by act of law without any office found,—the disseisee shall have remedy by petition of right,—suggesting the title of the crown, and his own superior right *before the disseisin* (*k*).] And in case the right be determined against the crown, the judgment used to be that of *ouster le main*, or *amoveas manus*,—viz. “*quod manus domini regis amoveantur, et possessio restituatur petenti, salvo jure domini regis*” (*l*)—which saving clause was always added to a judgment against the sovereign, to whom no laches can be imputed ; and whose right—save under some modern statutes—is never defeated by any limitation or length of time (*m*) ; and by such judgment, the crown was instantly out of possession,—so that there needed not the interposition of its own officers,—as upon an ejectment,—to transfer the seisin from the sovereign to the successful party (*n*).

The proceedings upon a petition of right (which at one time were extremely tedious and expensive) have been now

(*g*) Finch, L. 255.

(*h*) St. Tr. vii. 134.

(*i*) Skin. 608 ; Rast. Ent. 461.

(*k*) Bro. Ab. tit. Petition, 20 ;

(*l*) 2 Inst. 695 ; Rast. Ent. 463.

(*m*) Finch, L. 460 ; 2 & 3 Edw. 6,

c. 8, s. 14.

(*n*) Finch, L. 459

regulated by the 23 & 24 Vict. c. 34 ; and under that statute, the petition is required to be left with the secretary of state for the home department, for her Majesty's consideration ; who may thereupon grant her fiat that right be done ; and thereupon (the fiat having been served on the solicitor to the treasury) an answer, plea, or other defence is made on behalf of the crown, the subsequent proceedings being assimilated, so far as practicable, to the course of an ordinary action (*o*). And in cases in which a judgment of *amoveas manus* would theretofore have been given on a petition of right, a judgment that the suppliant is entitled to the whole or some portion of the relief sought by his petition—or to such other relief, and on such terms and conditions, as the court may think right—is given instead,—which judgment has the same effect as a judgment of *amoveas manus* (*p*). And upon any petition of right under the Act, *costs* are payable both to and by the crown, subject to the same rules, so far as practicable, as obtain in proceedings between subject and subject (*q*). Nothing in the Act prevents, however, any suppliant from proceeding as he might have done before it passed.

II. INJURIES TO THE CROWN.—The method of redressing such injuries as the crown may receive from the subject, may be by such actions as are consistent with the royal prerogative and dignity ; but more effectual remedies are usually obtained, by such prerogative modes of process as are peculiarly confined to the crown (*r*). [And among

(*o*) But the suppliant is not to be entitled to obtain discovery of documents or any other discovery (*Thomas v. The Queen*, Law Rep. 10 Q. B. 44). As to a petition of right, see also *Kirk v. The Queen*, Law Rep. 14 Eq. Ca. 558 ; *Windsor, &c. Rail. Co. v. The*

Queen, 11 App. Ca. 607 ; *Tobin v. The Queen*, 16 C. B. (N.S.) 310.

(*p*) 23 & 24 Vict. c. 34, ss. 9, 10.

(*q*) Sect. 12.

(*r*) It is said in the books, that the sovereign cannot bring ejectment, because that action supposes the dispossession of the plaintiff,

[these prerogative methods, is that of *inquisition* (or *inquest of office* (*s*),—which is an inquiry made by the sovereign's officer, his sheriff, coroner, or escheator, (either *virtute officii*, or by writ to them sent for that purpose,) or by commissioners specially appointed, concerning any matter that entitles the crown to the possession of lands or tenements, goods or chattels. And this is done by a jury of no determinate number—being either twelve, or less, or more (*t*); and the inquisition is to inquire, whether (*e.g.*) the crown's tenant for life died seised,—whereby the reversion accrues to the sovereign; or whether A., who held immediately of the crown, died without an heir,—in which case the land must belong to the sovereign by escheat; or whether B. be an idiot *a nativitate*,—and therefore, together with his lands, appertains to the custody of the sovereign; and other questions of a like import, concerning both the circumstances of the tenant, and the value or identity of his lands.

These inquests of office were frequently in use, during the continuance of the military tenures,—for upon the death of any tenant of the crown, such an inquest was held, called an *inquisitio post mortem*,—to inquire of what lands such tenant died seised, who was his heir, and of what age,—in order to entitle the king to his marriage, wardship, relief, *primer seisin*, or other advantage, as the circumstances of the case might turn out; and to superintend and regulate these inquiries, the Court of Wards and Liveries was instituted by the 32 Hen. VIII. c. 46; but that

whereas (in contemplation of law and by reason of his legal ubiquity) the crown can never be dispossessed; but the crown may bring *quare impedit*, because that supposes the plaintiff to be seised or possessed of the advowson (Bro. Ab. tit. Prerog. 89, 130; F. N. B.

90; Y. B. 4 Hen. 4, pl. 4; *Att.-Gen. v. Lord Churchill*, 8 Mee. & W. 172).

(*s*) 12 & 13 Vict. c. 109, ss. 30 *et seq.*; *Dean v. Reginam*, 15 Mee. & W. 475.

(*t*) Finch, L. 323, 425.

[court was abolished, at the restoration of King Charles the Second, with the abolition of the tenure in chivalry, *i.e.*, in knight's service.

Inquests of office, however, still remain in force, and are taken upon proper occasions,—being extended not only to lands, but also to goods and chattels personal,—as in the case of wreck, treasure trove, and the like ;] but the most frequent occasion for them in modern times has been to ascertain forfeitures for offences—as whether B. was attainted for treason, or whether C., lying dead, had died feloniously by his own hands, and the like,—this latter occasion, however, no longer existing, since, by the Felony Act, 1870, no inquest of any treason, felony, or *felo de se*, now causes any forfeiture or escheat (*u*).

[These inquests of office were devised by the law as an authentic means to give the sovereign his right by solemn matter of record,—for it is a part of the liberties of England, and greatly for the safety of the subject, that the sovereign may not enter upon (or seize) any man's possessions, upon bare surmises, without the intervention of a jury (*x*) ; and, by the 18 Hen. VI. c. 6, all grants of forfeited lands and tenements, before *office found*, are declared void ; and, by the Bill of Rights (1 W. & M. sess. 2, c. 2), all grants and promises of fines and forfeitures of particular persons before *conviction* are also declared void,—which indeed was the law of the land as early as the reign of Edward the Third (*y*).]

There are cases, however, in which the crown is entitled without office found,—the inquest (if held) being only for the better instruction of the officer before seizure, and to protect the subject from the adoption of hasty measures (*z*) ;

(*u*) 33 & 34 Vict. c. 23, s. 1.

(*z*) Gilb. Exch. 109, 13, 4 ; 16

(*x*) *Sheffield v. Ratcliffe*, Hob.
347 ; Gilb. Hist. Ex. 132.

Vin. Ab. 79, Office, B. ; 12 East,
102.

(*y*) 2 Inst. 48.

and though the rule formerly was, that where a common person cannot have possession without entry, the sovereign cannot have it without an office, yet now it is otherwise (*a*),—for, by the 22 & 23 Vict. c. 21, s. 25, when any right of re-entry upon lands or other hereditaments shall have accrued to the crown, such right may be exercised or enforced, without any inquisition taken or office found and without any actual re-entry being made on the premises.

As to the effect of these inquests when taken, it may be laid down as generally true with regard to real property, that if an office be found for the sovereign, and the land be not held at the time by a stranger, the finding puts the crown into immediate possession, without the trouble of a formal entry; and the crown shall receive all the mesne or intermediate profits from the time that its title accrued (*b*); but, by the *Articuli super cartas*, if the king's escheator or sheriff seize lands into the king's hand, without cause, upon taking them out of the king's hand again, the party shall have the mesne profits restored to him (*c*).

In order to avoid the possession of the crown acquired by the finding of such office, the subject may either have his petition of right, or may traverse the inquisition (*d*),—the traverse putting the finding in issue, and being the speedier remedy of the two; and under the provisions of the 28 & 29 Vict. c. 104, s. 52, in case the subject thinks himself aggrieved by any description of boundary or other finding on the inquisition, he is entitled also to file a statement of his objection thereto,—which objection shall thereupon be directed by the court to be inquired into by a fit person; when, if his return in writing differs in effect

(*a*) Chit. Prerog. 249.

(*d*) *In re Ann Parry, Ex parte*

(*b*) 3 Bl. Com. 260; Finch, L. 325, 326.

Duke of Beaufort, Law Rep. 2 Eq. Ca. 95.

(*c*) 28 Edw. 1, c. 19.

from the inquisition, the latter shall be deemed to be altered so as to conform with the return.

Also, upon all debts of record due to the crown, the sovereign has his peculiar remedy by writ of extent,—under which both the lands and the goods of the debtor may be taken at once, in order to compel the payment of the debt (*e*) ; and this proceeding is called an *extent*, from the words of the writ,—which directs the sheriff to cause the lands and goods to be appraised at their full (or extended) value (*extendi facias*), before they are delivered to satisfy the debt. A debt of record, where it is a crown debt, includes (besides a judgment debt) the following other debts, that is to say :—(1) Debts due to the crown generally,—for, it having been provided, in the case of debts acknowledged on statute merchant or statute staple, that (upon forfeiture of these) execution might issue at once, both against lands and goods (*f*),—it was, by the 33 Hen. VIII. c. 39, enacted, that *all* obligations made to the king should have the same force,—and of consequence the same remedy to recover them,—as a statute staple (*g*) ; and (2) Debts of accountants to the crown,—for, by the 13 Eliz. c. 4, the lands of all such treasurers, and other officers as therein mentioned, are made liable to the crown, *for debts due on their accounts*, in the same manner as if on the day they first became officers or accountants, respectively, they had stood bound by writing obligatory having the effect of statute staple (*h*) ; and, by the 43 Geo. III. c. 99, s. 41, and 5 & 6 Will. IV. c. 20, s. 13, duties detained in the hands of tax collectors may be recovered as a debt upon record to the crown, with all costs and charges (*i*).

(*e*) 3 Rep. 12 b ; Gilb. Ex. 7 ;
2 Saund. by Wms. 70.

(*f*) 2 Saund. 69 b.

(*g*) 3 Bl. Com. 420 ; *R. v. Lamb*,

3 Price, 649 ; 3 Rep. 12 ; Gilb. Ex. 7.

(*h*) *R. v. Rawlings*, 12 Price,
834 ; *R. v. Fernandez*, *ib.* 862.

(*i*) *R. v. Wrangham*, 1 Tyrw. 383.

A writ of extent, for the recovery of the crown's debt, commissions the sheriff to take an inquisition (or inquest of office), to ascertain the lands goods and debts of the defendant, and to seize the same into the hands of the sovereign. It has, however, in general, been held necessary, that the extent should be preceded by a *scire facias* (*k*), in order to bring the defendant into court, and afford him an opportunity of showing that the extent ought not to issue (*l*),—though, in cases where there is any danger of the debt being lost, an *immediate* extent may issue, (*i.e.*, an extent without either commission of inquest or *scire facias*,) upon affidavit of the circumstances (*m*). In ordinary cases, the writ having issued,—and the inquisition having been taken, and the seizure made under it by the sheriff, upon the same being returned into court,—the defendant, if he means to dispute the debt,—or any third person, who thinks proper to advance a claim to the property set forth in the inquisition,—must enter an appearance for that purpose; when he will be permitted to plead to the extent (*n*); and issue thereon having been joined either in law or in fact, the matter is decided according to the ordinary course of practice in actions between subject and subject.

With respect to the *effect* of an extent,—Firstly, the *lands* of a crown debtor are bound, in general, from the time when the debt becomes one of record (*o*),—which in the case of such bonds as are mentioned in the 33 Hen. VIII. c. 39, s. 50, is from the time the bonds are executed; and although, by the common law, debts (not of record) due from public officers and accountants

(*k*) Chit. Prerog. 271; Crown Offices Rules (1886), r. 127.

(*l*) Chit. Prerog. 271.

(*m*) Chit. Prerog. 277; 28 & 29 Vict. c. 104, s. 47.

(*n*) By 33 Hen. 8, c. 39, s. 55,

the crown debtor may allege or show any good and sufficient "matter in law, reason, or good conscience," in bar or discharge of the debt.

(*o*) 2 Roll. Ab. 156, B. pl. 1.

to the crown, bound the debtor's *lands*, only from the time they accrued due, yet (by the 13 Eliz. c. 4) arrears due from tellers, receivers, and such other officers as are in this behalf mentioned in the statute, are declared to bind the lands from the time when they entered into their offices (*p*) ; but now, by the 28 & 29 Vict. c. 104, s. 48, no debt due to the crown, on any judgment, decree, order, recognizance, inquisition of debt, obligation, or specialty,—nor in respect of any acceptance of office under the crown,—shall affect any lands, as to *bonâ fide* purchasers or mortgagees (with or without notice), unless a writ of execution has been issued and *registered* before the execution of the purchase deed or mortgage deed and payment of the money. And, Secondly, as regards the *goods* of the debtor, they are bound from the *teste* (or date) of the extent (*q*),—a rule which seems to apply also to any debts owing to the debtor (*r*) ; but, by the 33 Hen. VIII. c. 39, s. 74, in suing out execution, the crown's debt is preferred to that of every other creditor who has not obtained judgment before the crown commenced its action (*s*).

With regard to the *exoneration* of lands from crown debts, it has been provided, that whenever a *quietus* shall be obtained by a debtor or accountant to the crown—and an office copy thereof has been left at the proper office, together with a certificate signed by the paymaster-general, that the same may be registered,—the Master shall forthwith enter the same in the proper book accordingly (*t*). And for this purpose, the lords of the

(*p*) *Wilde v. Forte*, 4 Taunt. 334 ; Chit. Prerog. 294 ; 3 Bl. Com. 420 ; 1 & 2 Geo. 4, c. 121, s. 10.

(*q*) Chit. Prerog. 285 ; 1 Saund. by Wms. 219 g.

(*r*) 3 Bl. Com. 420. See Chit. Prerog. 304 ; *R. v. Lambton*, 5 Price, 428 ; *Shears v. Lord Advocate*, 6 Clark & Fin. 180.

(*s*) *Edwards v. Reginam*, 9 Exch. 628 ; *Re Oriental Bank*, 28 Ch. Div. 643 ; *In re West London Commercial Bank*, 38 Ch. Div. 364.

(*t*) 2 & 3 Vict. c. 11 ; 18 & 19 Vict. c. 15 ; 22 & 23 Vict. c. 35, s. 22 ; 23 & 24 Vict. c. 115.

Treasury, (or any three of them,) may, by writing under their hands,—upon payment of such sums as they shall think fit into the receipt of her Majesty's exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the crown, or upon such other terms as they may think proper,—certify, that any lands, tenements, or hereditaments of any such debtor or accountant shall be held by the purchaser or mortgagee, or intended purchaser or mortgagee thereof, wholly exonerated from all further claim of the crown; or (in the case of leases obtained on payment of fines) may certify, that the lessee shall hold the premises exonerated in like manner, without prejudice to the right of the crown to the reversion upon such lease, and the rents and covenants incident to such reversion,—and thereupon the same lands, tenements, and hereditaments shall respectively be held exonerated as aforesaid.

Such is, in general, the state of the law relating to the principal kind of extent, called an extent *in chief*; but a sub-variety of it (called an extent *in chief in the second degree*) may be here noticed,—this latter being in the nature of a garnishee order, that is to say, a proceeding against the debtor of him against whom an extent in chief has issued; and the 57 Geo. III. c. 117, presently to be mentioned, not applying thereto (*u*), this extent is regulated (*mutatis mutandis*) like the extent in chief itself.

Besides the extent in chief (whether of the first or second degree), there is also an extent *in aid*; and this latter extent issues, not at the suit of the crown (like an extent in chief), but at the suit or instance of the crown debtor against a person indebted to the crown debtor himself (*x*);

(*u*) *R. v. Shackle*, 11 Price, 772;
Reg. v. Adams, 2 Exch. 299.

(*x*) *R. v. Gibbs*, 7 Price, 633;
R. v. Tarleton, 9 Price, 647; *R. v. Kynaston*, 11 Price, 598.

and this practice, of issuing extents in aid, was at one time carried to so great a length, as to enable crown debtors (in almost every case) to convert to their own benefit a species of execution properly belonging to the crown,—thereby obtaining an undue preference as regards other creditors ; but the resort to extents in aid was subjected, by the 57 Geo. III. c. 117, to restraints which tended to the rectification of this abuse (*y*).

There is also a special writ of extent, which is applicable in the event of the death of a crown debtor ; and which is called a *diem clausit extremum*, because it recites the death of the party (*z*) ; and by this writ (which issues on an affidavit of the debt and death), the sheriff is commanded to take and seize the chattels, debts, and lands of the debtor who has so died, into the hands of the crown (*a*).

[When the crown hath unadvisedly granted anything by letters patent which ought not to be granted,—or where the grantee hath done some act that amounts to a forfeiture of the grant,—the remedy to repeal the patent used to be by writ of *scire facias* (*b*) ; which writ might be brought on the part of the crown, in order to resume the thing granted ; but, if the grant was injurious to a subject, the crown was *bound* to permit him (upon his petition) to use the royal name for repealing the patent, in a *scire facias* (*c*). And so also, if, upon office untruly found for the crown, the land was granted over to another, —he who was aggrieved thereby, and traversed the office itself, was entitled, before issue joined, to a *scire facias* against the grantee, in order to avoid the grant (*d*).] For

(*y*) No fiat for an extent in aid is issued, without an affidavit that there will otherwise be danger of the debt being lost to the crown.

(*z*) *Ex parte Hippesley*, 2 Price, 379 ; *R. v. Hodge*, 12 Price, 537 ;

R. v. Hassell, M'Clel. 105 ; *R. v. Lord Crewe*, 5 Dowl. 158.

(*a*) 28 & 29 Vict. c. 104, s. 47.

(*b*) 3 Lev. 220 ; 4 Inst. 88.

(*c*) *R. v. Butler*, 2 Ventr. 344.

(*d*) Bro. Ab. tit. Scire Facias, 69, 185.

which latter purpose, the remedy by *scire facias* is still available,—as it also is for the repeal of letters patent generally ; but in the case of letters patent for inventions, a petition (in the nature of a *scire facias*) for their repeal is now the proper remedy of the subject (*e*).

An *information* on behalf of the crown, exhibited by the attorney-general, is also a method of proceeding, for obtaining satisfaction in respect of an injury to any of the possessions of the crown (*f*) ; and it is instituted, to redress a *civil* injury by which the property of the crown is affected,—differing in this respect from the criminal information which is filed in the Queen's Bench Division of the High Court, to punish some heinous misdemeanor in the defendant, immediately affecting the sovereign and not such as can be properly left to a prosecution by way of indictment (*g*). [The most usual informations, of the description now under review,—that is to say, of the *civil* order,—are those of intrusion (*h*), and of debt (*i*) : the information of *intrusion* being for any trespass committed on the lands of the crown (*k*),—as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, and the like ; and the information of *debt* being for moneys due to the crown upon the breach of a penal statute (*l*). This civil information is also commonly used, to recover forfeitures occasioned

(*e*) 46 & 47 Vict. c. 57, s. 26 ;
In re Avery's Patent, 36 Ch. Div.
307.

(*f*) *Yelverton's Case*, Moor, 375 ;
Att.-Gen. v. Edmunds, Law Rep.
6 Eq Ca. 381.

(*g*) *Vide post*, vol. iv. bk. vi.
chap. xiv.

(*h*) 4 Rep. 58 a ; *Attorney-
General v. Parsons*, 2 M. & W. 23 ;
Attorney-General v. Hill, *ib.* 160.

(*i*) *Attorney-General v. Sewell*,
4 Mee. & W. 77.

(*k*) *Nannge v. Rowland ap Ellis*,
Cro. Jac. 212 ; *Lord Vaux's Case*,
1 Leon. 49 ; *Attorney-General v.
Lord Churchill*, 8 Mee. & W. 171 ;
Attorney-General v. Hallett, 1
Exch. 211.

(*l*) See 41 Geo. 3, c. 90, as to
enforcing, in Ireland, payment of
crown debts recovered in England,
and *vice versa*.

[by transgressions of the revenue laws,—penalties inflicted by the laws which regard matters of police and public convenience being usually left to be enforced in *qui tam* actions, *i.e.*, by common informers,—although, after the attorney-general has informed upon a breach of the penal law, no other information can be received (*m*).

There is also an information *in rem*, when any goods are supposed to become the property of the crown, and no man appears to claim them or to dispute the crown's title :—as, antiently, in the case of treasure-trove, wrecks, waifs, and estrays, seized by the crown's officer for its use. For, upon such seizure, an information may be filed in the Exchequer (now the Queen's Bench Division), and thereupon a proclamation is made for the owner (if any) to come in and claim the effects ; and at the same time a commission of *appraisement* issues, to value the goods in the officer's hands ; and after the return of the commission, and a second proclamation had, if no claimant appear, the goods are supposed derelict, and are condemned to the use of the crown (*n*). And when, in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by Act of Parliament for transgressions against the laws of the customs and excise,—there was the same process, in order to secure such forfeited goods to the public use, though the offender himself should escape the reach of justice.]

Finally, we may remark, that by the 18 & 19 Vict. c. 90, ss. 1, 2, the subject of costs in all legal proceedings, by or on behalf of the crown in matters relating to the *public revenue*, was placed upon the same footing as the subject of costs in actions between subject and subject (*o*),

(*m*) Hard. 201.

(*n*) Gilb. Hist. Exch. ch. 13.

(*o*) By 25 & 26 Vict. c. 14, the provisions of this statute were extended to the *Isle of Man*.

—though, by the general rule of law, as it stands independently of this statute, the crown neither pays nor receives costs (*p*) ; and by a modern statute, commonly called “The Crown Suits Act, 1865,” the proceedings in the Exchequer, by way of information, and in other matters relating to the revenue, were simplified and assimilated, in many respects, to the procedure in an action (*q*) ; and they have been further simplified by the Order of 1883, relative to this procedure (*r*), and by the Crown Office Rules, 1886 (*s*).

(*p*) See 24 Hen. 8, c. 8 ; 3 Bl. Com. 400 ; 25 Geo. 3, c. 35 ; *Attorney-General v. Shillibeer*, 4 Exch. 606 ; *The Queen v. Beadle*, 7 Ell. & Bl. 492.

(*q*) 28 & 29 Vict. c. 104. See also 18 & 19 Vict. c. 90 ; and 22 & 23 Vict. c. 21.

(*r*) Ord. lxviii. r. 2.

(*s*) See Mellor's Crown Practice.

CHAPTER XIV.

OF THE INTERLOCUTORY PROCEEDINGS IN ACTIONS ;
AND OF PREROGATIVE WRITS.

DURING the regular course of an action,—and some of them immediately after the issue (and even before the service) of the writ, but not usually until after such service,—divers proceedings (called interlocutory) may be, and commonly are, taken ; and it will be convenient now to consider them ; after which, we shall advert to certain extraordinary remedies, distinct in their nature from actions, and which are called *prerogative writs*,—interlocutory proceedings and prerogative proceedings being, in general, both commenced by way of “*motion*,” although proceedings of the class called interlocutory may now also be taken on “*summons*” (*a*).

I. MOTIONS FOR INTERLOCUTORY ORDERS.—A motion is an application made to a judge (or to a divisional court)

(*a*) For example, the following applications :—(1) For extensions of time to plead, or to do any other act for which time is extendible ; (2) For leave to amend the writ or pleadings ; (3) For orders for the production and inspection of documents, and for the inspection of property ; (4) For the appointment of guardians *ad litem*, in the case of infants and lunatics not so found being defendants ; (5) For leave to issue writ of summons for service out

of jurisdiction ; (6) For order to take ordinary account ; (7) For order to sign final judgment where writ is specially indorsed with particulars of debt or liquidated demand ; (8) For directions generally, under Ord. xxx. ; and (9) For orders under the Debtors Act, 1869. And see also Ord. liv. (proceedings in chambers generally) ; and Ord. lv. (proceedings in chambers, Chancery Division).

vivâ voce, in open court (*b*); and it can be made, in general, by any one on his own behalf; but, unless made by the party himself, it can only be made by counsel, to the exclusion of solicitors,—save in the Bankruptcy division; and the motion is usually supported by an *affidavit* of the matters of fact on which it is founded (*c*). The object of the motion is, in general, to obtain an order (or *rule*) directing, in favour of the applicant, some act to be done or abstained from by some other person,—which order or rule, when obtained, is served upon the party affected by it.

The rule so moved for used to be (and occasionally still is) moved for *ex parte*; and is, in its form, either a rule to *show cause* (otherwise called a rule *nisi*), commanding the party, on a certain day therein named, to show cause to the court, why he should not perform the act or submit to the terms therein set forth; or else it is a rule *absolute in the first instance*, commanding the thing to be done,

(*b*) Under the Judicature Acts, two or more of the judges of the High Court sitting together are termed Divisional Courts (corresponding to the old sittings in *banc*); and certain matters are prescribed to be determined by a divisional court, instead of by a single judge; *e.g.*, proceedings on the crown side of the Queen's Bench Division; appeals from the county courts; proceedings under any statute wherein the decision of the court is final; and, formerly, appeals from the judge at chambers in the common law divisions (36 & 37 Vict. c. 66, s. 41; 38 & 39 Vict. c. 77, s. 17; and Ord. lix. r. 1); but these latter appeals now go to the Court of Appeal

direct (57 & 58 Vict. c. 16, s. 1),—at least in matters of practice and procedure.

(*c*) *Affidavits* are made on various occasions; and, by the Judicature Acts, it is provided, that, on any *motion*, *petition*, or *summons*, evidence may be given by affidavit, subject to an order for the attendance for cross-examination of the person making such affidavit on the application of either party; and that affidavits shall be confined to such facts as the witness is able of his own knowledge to prove,—except on *interlocutory* motions, on which statements as to his belief, with the grounds thereof, may be admitted. (Ord. xxxvii. rr. 2, 3.)

without the appointment of any day to show cause. And if the rule be a rule *nisi*, the counsel for the party on whom it has been served, appears on the day appointed, and is heard in opposition to it ; and (the counsel by whom it was moved having been afterwards heard in reply) the court either discharges the rule, or makes it absolute, as the case may be ; but if the party served with the rule fail to appear in opposition to it, it is made absolute as a matter of course. And in either case, the rule absolute is then served on the party ruled ; and he is bound to obey it, upon peril of being attached for contempt.

Prior to the Judicature Acts, the great majority of motions were for a rule to show cause, and were made *ex parte* ; but now, under the practice as regulated by these Acts, every motion (except where, under the former practice, it would have been for a rule absolute in the first instance) must be preceded by a notice to the party to be affected thereby (*d*) ; and the course, therefore, now is, that no rule or order to show cause is granted *in any action* (for the practice is thus limited), except in such cases as are expressly authorized by the Rules (*e*) ; and consequently (except in such few cases), all motions are now on notice, and the matter is finally disposed of, when it is first brought before the court.

The most usual occasions for *moving* the court,—*i.e.*, for making a motion,—are, where an interim injunction is wanted to stay the completion of some act ; or where an interim receiver is wanted to receive (and to hold *in medio*) certain moneys or securities the title to which is in dispute in the action ; and it is provided by the Judicature Act, 1873 (*f*), s. 25 (8), that an injunction may be granted

(*d*) Ord. lii. r. 2.

(*e*) Ord. lii. r. 2. The appeal from a county court to a divisional court is now also by motion *on*

notice (51 & 52 Vict. c. 43, ss. 120, 125 ; Ord. lix. rr. 9—17).

(*f*) 36 & 37 Vict. c. 66.

or a receiver appointed by an interlocutory order of the court, in all cases where it shall appear to the court to be “*just and convenient*” to do so (*g*),—and the application may be made either by the plaintiff or by the defendant,—by the plaintiff either *ex parte* or on notice, but usually on notice ; and by the defendant on notice only ; and if by the plaintiff, then even before the defendant’s appearance to the writ of summons ; but if by the defendant, only after his appearance to the writ (*h*).

Also, when (by any contract) a *primâ facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the court may make an interlocutory order for the preservation or interim *custody* of the subject-matter of the litigation,—or may order, that the amount in dispute be brought into court or otherwise secured (*i*) ; and the court may also make an order for the *detention, preservation, or inspection* of any property being the subject of the action, and may authorize any persons to *enter* upon or into any land or building in the possession of either party to the action,—and for all or any of the purposes aforesaid, may authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence (*k*). Again, the court may, on the application of either party to the action, make an order for the *sale* of any goods, wares, or merchandize, which may be of a perishable nature or likely to injure from keeping, or which for other just and sufficient reason it may be desirable to have sold at once (*l*).

And as regards proceedings in *interpleader*, — the defendant may interplead at any time after having been

(*g*) *Beddow v. Beddow*, 9 Ch. D.
89; *Day v. Brownrigg*, 10 Ch. D. 307.

(*h*) Ord. 1. r. 6.

(*i*) Ord. 1. r. 1.

(*k*) *Ibid.* r. 3.

(*l*) *Ibid.* r. 2.

served with the writ of summons and before delivering his defence (*m*) ; and the sheriff may interplead, where his levy at the suit of the execution-creditor is hindered by some person (other than the execution-debtor) claiming the goods seized (*n*) ; and where the defendant is the applicant in interpleader, the court usually stays all further proceedings in the action (*o*) ; and the court may either summarily dispose of the question,—*scil.*, where both parties consent, or where (the matter being a small one) either party requests that mode of decision (*p*) ; or the court will put the issue of fact or of law in a formal shape for trial (*q*) ; and the decision of the court on such an issue is always appealable,—although the summary decision of the court is not appealable, even by leave (*r*). And under the provisions of the Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 17, interpleader proceedings in the High Court, in which the amount or value of the matter in dispute does not exceed 500*l.* may be removed into the county court, by order of the High Court.

II. PREROGATIVE WRITS.—The principal of these writs are (1) The writ of *scire facias* ; (2) The writ of *procedendo* ; (3) The writ of *mandamus* ; (4) The writ of *prohibition* ; (5) The writ of *quo warranto* ; (6) The writ of *habeas corpus* ; and (7) The writ of *certiorari* ; and we shall shortly consider each of these seven prerogative writs.

(1.) WRIT OF SCIRE FACIAS.—This is a writ (founded on some record) requiring the person against whom it is brought, to show cause why the party bringing it should not have advantage of the record,—or else, why the record

(*m*) Ord. lvii. r. 4.

(*n*) *Ibid.* r. 1.

(*o*) *Ibid.* r. 6.

(*p*) *Ibid.* r. 8.

(*q*) Ord. lvii. rr. 7, 9.

(*r*) *Ibid.* r. 11 ; *Lyon v. Morris*,
19 Q. B. D. 139.

should not be annulled and vacated (*s*). An instance of the former species would be, when brought in order to obtain restitution after a judgment has been reversed on appeal (*t*) ; and of the latter species, when the writ is not supplementary to an action, but is an independent and original proceeding,—as a *scire facias* (and now a petition in the nature thereof) to repeal a patent (*u*) ; or a *scire facias* to make the individual members of a company liable upon a judgment recovered against their public officer, sued as representing the company. No specific mention of a *scire facias* is made in the Judicature Acts ; but as it was considered in law an action (*x*), it may be presumed to come, at least for some purposes, under the provisions of these Acts ; but a *scire facias*,—to enforce, *e.g.*, a bond given to the Crown,—is itself a writ, and requires the defendant, within fourteen days, to plead thereto ; and in pleading to a supplementary *scire facias*, the defendant shall make no defence which he might have made originally in the action (*y*).

(2.) WRIT OF PROCEDENDO.—This writ issues when the judge of an inferior court doth delay the parties, neglecting to give judgment, either on the one side or the other, when he ought so to do (*z*). In such a case, a *procedendo ad judicium* shall be awarded, commanding the inferior court, in the name of the crown, to proceed to judgment ; and upon further neglect or refusal, the judge of the inferior court may be punished for his contempt, by writ of attachment returnable in the High Court. A *procedendo* may also be awarded out of the High Court, where an action has been removed to it from an inferior

(*s*) Arch. Pr. (13th ed.), p. 934.

(*t*) 15 & 16 Vict. c. 76, s. 132.

(*x*) Arch. Pr. (13th ed.), p. 934.

(*y*) *Underhill v. Devereux*, 2

(*u*) 12 & 13 Vict. c. 109, s. 29 ;
15 & 16 Vict. c. 83, s. 15 ; 46 &
47 Vict. c. 57, s. 26.

Saund. by Wms, 72 t ; *Fowler v.*
Rickerby, 2 Man. & Gr. 760.

(*z*) F. N. B. 153, 240.

court, and it appears to have been removed on insufficient grounds (*a*); and by the 21 Jac. I. c. 23, a suit once so remanded, shall not be again removed before judgment into any court whatsoever.

(3.) THE WRIT OF MANDAMUS.—The power of issuing this writ (meaning the *prerogative* writ, as distinguished from the *mandamus* which was introduced by the Common Law Procedure Act, 1854 (*b*), and which latter may be described as a *mandamus incidental to an action or other proceeding*), belongs exclusively to the Queen's Bench Division of the High Court of Justice (*c*). [It is a high prerogative writ, of a most extensive remedial nature; and, in its form, it is a command issuing in the Queen's name, and directed to any person, corporation, or inferior court of judicature, within the crown's dominions, requiring him or them to do some particular thing therein specified which appertains to their office and duty; and which the court has previously determined (or at least assumes) to be consonant to right and justice. In its application, it may be considered as confined to cases where relief is required in respect of the infringement of some *public* right or duty (*d*), and where no effectual relief can be obtained in the ordinary course of an action (*e*). Such is the general principle; but as to the

(*a*) 21 Jac. 1, c. 23; Jac. Dict. *Procedendo*; *Garton v. Great Western Railway Company*, 1 E. & E. 258.

(*b*) 17 & 18 Vict. c. 125. Even prior to that Act, there was, for one purpose, a *mandamus* auxiliary to an action, viz., the *mandamus* to examine witnesses in India and other British dominions in foreign parts (13 Geo. 3, c. 63, s. 44, and 1 Will. 4, c. 22, s. 1).

(*c*) 36 & 37 Vict. c. 66, s. 34;

Ord. liii. r. 5; Crown Office Rules, 1886, rr. 60—80; *Hayward v. East London Waterworks Co.*, 28 Ch. Div. 138.

(*d*) *R. v. Bank of England*, 2 B. & Ald. 622.

(*e*) *R. v. Bishop of Chester*, 1 T. R. 396; *The Queen v. Lancashire & Yorkshire Railway Company*, 1 Ell. & Bl. 228. It is no objection to granting a *mandamus*, that the party against whom the complaint is made may be

[specific instances in which the writ will be granted, they are much too numerous for complete detail (*f*) ; but (among other cases) this writ lies, to compel, *e.g.*, the admission or restoration of the applicant to any office or franchise of a public nature, (whether spiritual or temporal,) to academical degrees, to the use of a meeting house, or the like; and it will also be granted for the production, inspection, or delivery of public books and papers; or to compel the surrender of the regalia of a corporation; or to oblige bodies corporate to affix their common seal; or to compel the holding of a court,—or the proceeding to an election in corporate and other public offices (*g*). In addition to which, we may notice, as another important application of this writ, that a mandamus (or an order in the nature thereof) will issue to the judges of inferior courts, commanding them to do justice according to the power of their office, whenever the same is delayed (*h*); for it is the peculiar business of the Queen's Bench to superintend inferior tribunals, and to enforce therein the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them,—and this not only by restraining

proceeded against by *indictment* (*R. v. Severn Railway Company*, 2 B. & Ald. 646); but the existence of a specific civil remedy is always an objection to the issue of a *mandamus* (*In re Nathan*, 12 Q. B. D. 461; *Reg. v. Registrar of Joint Stock Companies*, 21 Q. B. D. 131).

(*f*) 1 Chit. Gen. Pr. of Law, 789; *Ex parte Lee*, Ell. Bl. & Ell. 863; *The Queen v. Southampton*, 1 Ell. Bl. & E. 5.

(*g*) 11 Geo. 1, c. 4; 7 Will. 4 & 1 Vict. c. 78, s. 24; *R. v. Norwich*, 1 B. & Adol. 310.

(*h*) Under the County Courts

Act, 1888 (51 & 52 Vict. c. 43), s. 131, repealing and re-enacting a former provision to the like effect contained in the 19 & 20 Vict. c. 108, s. 43 (amended by 21 & 22 Vict. c. 47, s. 4), no writ of *mandamus*, but only an order or summons in the nature of a *mandamus*, shall issue to a judge or officer of a county court, *for refusing to do any act relating to the duties of his office*; and the same is the course with regard to a *stipendiary* or other magistrate (11 & 12 Vict. c. 44, s. 5).

[their excesses, but also by quickening their diligence, and obviating their denial of justice (*i*).

This writ is granted on a suggestion, upon the oath of the party injured, of his own right and the denial of justice elsewhere,—a refusal being one of the essentials to the issue of the writ (*k*) ; and in order more fully to satisfy the court that there is a probable ground for such interposition, a rule *nisi* is made,—except under particular circumstances, where a rule will be granted absolute in the first instance (*l*),—directing the party complained of, to show cause why a writ of *mandamus* should not issue ; and if he shows no sufficient cause, and does not submit without contest to the application, the writ itself is issued at first in the alternative, either to do this or else to signify some reason to the contrary,—to which a *return* or answer must be made at a certain day. If the person to whom the writ is directed makes no return, he is punishable for his contempt by attachment ; and if he makes a return, and it be found either insufficient in law or false in fact, there then issues in the second place a *peremptory mandamus* to do the thing absolutely,—to which no other return will be admitted, but a certificate of perfect obedience to, and compliance with, the writ (*m*).]

The sufficiency of the return, in *point of law*, was formerly determined, unless a special argument were ordered, in a summary way upon motion ; but as to the truth of its allegations *in point of fact*, it was a rule, that this could not be investigated by any further proceeding on the *mandamus*,—the complaining party having no remedy in case the facts were untruly alleged, save that of an action on the case for a false return,—in which

(*i*) *Reg. v. Cotham*, [1898] 1 Q. B. 802.

(*k*) *R. v. Brecknock, &c. Company*, 3 A. & E. 217.

(*l*) *R. v. Archdeacon of Lichfield*,

5 Nev. & M. 42 ; 6 & 7 Vict. c. 89, s. 5 ; 17 & 18 Vict. c. 125, s. 76 ; Crown Office Rules (1886), rr. 60—79.

(*m*) *R. v. Ledgard*, 1 Q. B. 616.

action, if he obtained a verdict, he recovered damages equivalent to the injury sustained, together with a peremptory *mandamus* to the defendant. But now, by the 1 Will. IV. c. 21, in all cases of *mandamus*, the return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue or (in effect) demur, and the same proceedings may be had as if an action had been brought for making a false return; so that now the writ of *mandamus* is, (from the period at least of its return,) assimilated to an action; and the more closely, because it is also provided, that the prosecutor, if successful, shall recover damages, and that the successful party shall, in all cases, upon judgment after issue joined or by default, be entitled to his costs (*n*). In addition to which, it was enacted, by the 6 & 7 Vict. c. 67, that a prosecutor objecting to the validity of the return, should do so by way of demurrer to the same, in like manner as in an action; and thereupon the writ, return, and demurrer should be entered on record, and the court should adjudge either that the return was valid in law, or that it was not valid in law, or that the writ of *mandamus* itself was not valid in law; and if the court adjudged that the writ was valid, but the return invalid, it was to proceed to award a peremptory *mandamus*; and also, in any event, costs to be paid to the successful party (*o*); and under the present practice, the invalidity of the return in point of law must now be raised in the answer to the return as on the pleadings, and will be disposed of as a like question raised in a purely civil proceeding is disposed of (*p*).

(*n*) *R. v. Oundle*, 1 A. & E. 283; *R. v. Governors of Darlington School*, 6 Q. B. 682; *The Queen v. Ambergate Railway Company*, 17 Q. B. 957; *The Queen v. Ingham*, 17 Q. B. 884.

(*o*) The provisions of the Common Law Procedure Acts, 1852 and

1854, were applied (so far as they were applicable) to the proceedings and pleadings upon a prerogative writ of *mandamus* (17 & 18 Vict. c. 125, s. 77; and see Crown Office Rules (1886), rr. 77, 78).

(*p*) Crown Office Rules (1886), r. 70.

Besides these provisions, we may notice an enactment of the 1 & 2 Will. IV. c. 58, s. 8, whereby, in favour of officers and other persons to whom a writ of *mandamus* is directed to issue, commanding them to admit to offices, or to do or perform other matters in respect of which they claim no right or interest,—it is provided, that it shall be lawful for the court, to which application is made for the writ, to relieve them from the liabilities incident to the execution thereof, by calling upon any other person having or claiming any interest in the matter to appear and show cause against the issuing of the writ; and thereupon the court may make such rules and orders between all parties as the circumstances of the case may require; and this provision has been adopted by the Judicature Acts (*q*).

As regards the *mandamus* which (as above is mentioned) was introduced by the Common Law Procedure Act, 1854, it may be convenient to here mention, that (under that Act) the plaintiff in any action, (except replevin and ejectment,) may indorse upon his writ of summons a notice that he intends to claim a writ of *mandamus*, commanding the defendant to perform some duty in which the plaintiff is interested, and to enforce which there is no other remedy (*r*); and judgment may be given for the *mandamus* to issue; and thereupon a peremptory writ of *mandamus* forthwith issues, commanding the defendant to forthwith perform the duty; and in case of disobedience, he may be attached, or the court may direct the act to be done by the plaintiff, (or by some person appointed for the purpose by the court,) at the expense of the defendant; and when the act required by the judgment of the court to be done is

(*q*) Crown Office Rules (1886),
r. 73.

(*r*) 17 & 18 Vict. c. 125, ss. 68—76.
Benson v. Paull, 6 Ell. & Bl. 373;
Ward v. Lowndes, 1 E. & E. 940;

Bush v. Beavan, 1 Hurl. & C.
500; Ord. liii. r. 1; *Reg. v. Lam-
bourne Valley*, 22 Q. B. D. 463;
Reg. v. L. & N. W. Rail. Co.,
[1894] 2 Q. B. 512.

the execution of any conveyance, contract, or other document, or the indorsement of any negotiable instrument, the Judicature Act, 1884 (*s*), s. 14, has adopted this alternative provision. And with reference to this species of *mandamus*, the Judicature Acts have provided, that a *mandamus* may be granted, by an *interlocutory* order of the court, in all cases in which it shall appear to the court to be “*just or convenient*” that such order should be made (*t*); and such order may be made either unconditionally or upon such terms and conditions as the court shall think just; but no writ of *mandamus* now issues in such a case, the order itself, which commands the defendant to do the act, having the same effect as the old writ (*u*).

(4.) THE WRIT OF PROHIBITION.—This writ is [directed to the judge and parties to a suit in any inferior court, commanding them to cease from the prosecution thereof,—upon a surmise, either that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court (*x*). The writ may issue to any species of inferior court, if it concerns itself with some matter not within its jurisdiction (*y*); or if, in handling matters clearly within its cognizance, it transgresses the bounds prescribed to it by the laws of England (*z*),—as where a spiritual court

(*s*) 47 & 48 Vict. c. 61, s. 14; *Re Edwards*, 33 W. R. 578; *Howarth v. Howarth*, 11 P. Div. 78.

(*t*) 36 & 37 Vict. c. 66, s. 25, sub.-s. (8); Ord. l. r. 6; *In re Paris Skating Rink Company*, 6 Ch. D. 731.

(*u*) Ord. liii. rr. 3, 4.

(*x*) *Tucker v. Tucker*, 4 Man. & Gr. 1074; *Re Dean of York*, 7 Q. B. 1.

(*y*) 3 Bl. Com. p. 112; *Reg. v.*

Lincolnshire County Court Judge, 20 Q. B. Div. 167.

(*z*) If sentence has been given in the court below, the superior court will presume that there was no excess of jurisdiction,—unless such excess be distinctly proved, or be apparent on the face of the proceedings (*Hart v. Marsh*, 5 Ad. & Ell. 591; *Broad v. Perkins*, 21 Q. B. D. 533); and as a county court has, in winding-up matters,

[requires two witnesses to prove a release or payment of tithes (*a*), or the like (*b*): for as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in such courts because incident or accessory to some original question clearly within their jurisdiction, it ought therefore, where the two laws differ, to be decided not according to the spiritual, but according to the temporal, law; else the same question might be determined in different ways, according to the court in which the suit is depending,—an impropriety which no wise government can or ought to endure, and which is therefore a ground of prohibition (*c*).]

The method of proceeding in prohibition is as follows (*d*):—The party aggrieved in the court below applies to the High Court, setting forth the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom. And this used formerly to be done by filing, as of record, a *suggestion*, containing a formal statement of the facts; but, by the 1 Will. IV. c. 21, it has been provided, that it shall not be necessary to file any suggestion, but that an application for a prohibition may be made on *affidavits* only, as on an ordinary motion; upon which, if

all the jurisdiction of the High Court, there can be no prohibition in such a case to the county court (*In re New Par Consols*, [1898] 1 Q. B. 669).

(*a*) *Mallory v. Marriott*, Cro. Eliz. 667; Hob. 188.

(*b*) A prohibition will not be awarded in respect of a mere point of practice (*Ex parte Smyth*, 1 Tyr. & G. 227; *Jolly v. Baines*, 12 Ad. & El. 201; *Ex parte Story*, 12 C. B. 767); nor at the instance of a *stranger* to the suit. (*The*

Queen v. Twiss, Law Rep. 4 Q. B. 407.)

(*c*) 3 Bl. Com. p. 112.

(*d*) No mention is made in the Judicature Acts of a prohibition, —except that, in Ord. liv. r. 12, it is mentioned as one of the matters which cannot be dealt with at chambers by a *master* in place of a judge; and except that, by Ord. lxviii. rr. 2—4, the practice in an ordinary civil proceeding is, to the specified extent, made applicable to prohibition; and see Crown Office Rules, 1886, rr. 81, 82.

the matter alleged appear to the court to be sufficient, the prohibition immediately issues commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion ; and then, for the more solemn determination of the question, the party applying for the prohibition may be directed by the court to deliver a statement (formerly called the *declaration in prohibition*), setting forth, in a concise manner, so much of the proceeding in the court below as may be necessary to show the ground of the application, and praying that a prohibition may issue (*e*) ; and to the above statement, the defendant might have demurred, or raised such other defence as was proper to show that the writ ought not to issue ; and in case a verdict on an issue of fact raised on such statement was given for the plaintiff, the jury assessed damages (*f*). Consequently, the effect of the provisions of the 1 Will. IV. c. 21, was to place prohibitions (unless disposed of, as was more generally the case, on the motion itself) substantially upon the footing of an action ; and it has been expressly provided by the Judicature Acts (*g*), that the particular provisions therein specified shall apply to proceedings in prohibition equally as to purely civil proceedings ; and that when pleadings are ordered, they and all subsequent proceedings therein shall, as nearly as may be, correspond with the pleadings and subsequent proceedings in an ordinary action. After a rule for a prohibition has been made absolute, if either

(*e*) 1 Will. 4, c. 21, s. 1 ; *Remington v. Dolby*, 9 Q. B. 176 ; *Worthington v. Jeffries*, Law Rep. 10 C. B., *per cur.*, p. 386. With regard, however, to applications for a prohibition to a *county court* (which are usually made at chambers), it has been provided, by 51 & 52 Vict. c. 43, s. 128, re-enacting

the like provision in 19 & 20 Vict. c. 108, s. 42, that the matter shall be finally disposed of by the rule or order, without any declaration in prohibition.

(*f*) *White v. Steele*, 13 C. B. 231.

(*g*) Ord. lxviii. ; see rr. 2—4.

the judge of the court below, or any party to the cause or proceeding pending therein, shall proceed in disobedience to it, an attachment may be had against him to punish him for the contempt; and an action for damages will also lie at the suit of the injured party (*h*).

(5.) THE WRIT OF QUO WARRANTO.—The writ of *quo warranto* was in the nature of a writ of right for the crown, against him who claimed or usurped any office, franchise, or liberty,—to inquire, in order to determine the right, by what authority he supported his claim (*i*). It lay also in case of non-user or long neglect of a franchise, or mis-user or abuser of it,—commanding the defendant to show by what warrant he exercised the franchise, having never had any grant of it, or else having forfeited it by neglect or abuse. The writ of *quo warranto* was originally returnable before [the king's justices at Westminster (*k*); but afterwards, by virtue of the statutes of *quo warranto* (6 Edw. I. c. 1 and 18 Edw. I. st. 2), only before the justices in eyre. But after those justices gave place to temporary commissioners of assize,—the judges on the several circuits,—this branch of those statutes lost its effect; and writs of *quo warranto* were then (as before) prosecuted and determined before the king's justices at Westminster. And in case of judgment for the defendant, he had an allowance of his franchise; but in case of judgment for the crown,—for that the party was entitled to no such franchise, or had disused or abused it,—the franchise was either seized into the sovereign's hands, to be granted out again to whomsoever the sovereign should please; or, if it were not such a franchise as might subsist in the hands of the crown, there

(*h*) F. N. B. 40; 2 Inst. 601—
618.

(*k*) Old. Nat. Brev. fol. 107,
edit. 1534.

(*i*) Finch, L. 322; 2 Inst. 282.

[was merely judgment of *ouster*, to turn out the party who usurped it (*l*). The judgment in *quo warranto* was final and conclusive, even against the crown: and this, together with the length of its process, probably occasioned that disuse into which it gradually fell: and introduced the modern method of proceeding in similar cases,—*i.e.*, by information, filed by the attorney-general, *in the nature of* a writ of *quo warranto*,—wherein the process is speedier, and the judgment not quite so decisive (*m*); and which information is properly a *criminal* proceeding, to punish the usurper by a fine for the usurpation of the franchise, as well as to oust him or seize it for the crown (*n*). But this information hath long been applied to the mere purpose of trying the civil right,—seizing the franchise, or ousting the wrongful possessor, the fine being nominal only (*o*); and it is therefore, now, considered as merely a

(*l*) 2 Inst. 498; Rast. Entr. 540; *R. v. Stanton*, Cro. Jac. 259; *R. v. Mayor of London*, 1 Show. 280.

(*m*) Under the Judicature Acts, such informations (which formerly were always filed in the Court of Queen's Bench) belong exclusively to the Queen's Bench Division (36 & 37 Vict. c. 66, s. 34; Ord. lxviii. r. 2).

(*n*) During the violent proceedings that took place towards the end of the reign of King Charles the Second, it was (among other things) thought expedient to new-model most of the corporations in the kingdom; for which purpose, many of those bodies were persuaded to surrender their charters; and informations in the nature of *quo warranto* were brought against others,—as upon a forfeiture of their franchises by neglect or abuser of them; and the conse-

quence was, that the liberties of most of them were seized into the hands of the king, who granted them fresh charters, with such alterations as were thought expedient; and, during their state of anarchy, the crown named all their magistrates. But this exertion of power, though strictly legal, caused great alarm; and it was thought necessary, at the Revolution, to bridle this branch of the prerogative, at least so far as regards the metropolis; wherefore the statute 2 W. & M. c. 8, declared, that the franchises of the city of London should never thereafter be seized for any forfeiture or misdemeanor whatsoever (3 Bl. Com. pp. 263, 264).

(*o*) An information in *quo warranto* to try the title to an office which has determined, will not be granted (*Re Harris*, 6 Ad. & El.

[*civil* proceeding (*p*), and in which therefore a new trial may be had, although the verdict should have been for the defendant (*q*). And, under the provisions of 9 Ann. c. 25, this proceeding is now available as between party and party, and without any intervention of the prerogative ; for that statute permits an information, in the nature of a *quo warranto*, to be brought (with leave of the court) (*r*), at the relation of any person desiring to prosecute the same,—who is then styled the *relator* (*s*),—against any person usurping, intruding into, or unlawfully holding a franchise, or office, in any city, borough, or town corporate (*t*) ; and the same Act provides also for the speedy determination of such information ; and directs, that if the defendant be convicted, judgment of ouster, (as well as a fine,) may be given against him ; and that the relator shall pay, or shall receive, costs, according to the event of the suit (*u*).]

And as regards such civil proceedings in *quo warranto*,

475) ; nor will that process be granted for a mere irregularity in an election not affecting the result (*The Queen v. Ward*, Law Rep. 8 Q. B. 210). Nor does this remedy lie in respect of the office of guardian to a poor law union (*Re Aston Union*, 6 Ad. & El. 784) ; or in respect of the office of clerk to the justices of a borough (*The Queen v. Fox*, 8 Ell. & Bl. 939) ; but it lies in respect of the office of clerk to a statutory board of guardians (*The Queen v. St. Martin's-in-the-Fields*, 17 Q. B. 149).

(*p*) 4 Bl. Com. 312.

(*q*) *R. v. Francis*, 2 T. R. 484. The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), did not apply to an information in *quo warranto* (*Reg. v. Seale*, 5 Ell. &

Bl. 1) ; but Ord. lxviii. r. 2, applies the procedure in purely civil actions to proceedings in *quo warranto*, so far as regards affidavits, motions, appeals, and the like.

(*r*) *R. v. Parry*, 6 A. & E. 810.

(*s*) The relator must swear an affidavit, to the effect that he is relator (Crown Office Rules, 1886, r. 54 ; *R. v. Hedges*, 11 Ad. & El. 163 ; *R. v. Anderson*, 2 Q. B. 740 ; *R. v. Greene*, 2 Q. B. 460).

(*t*) An information in *quo warranto* cannot be brought against persons assuming to act as a corporation, unless at the instance of the attorney-general. (*R. v. White*, 5 Ad. & El. 613).

(*u*) *Lloyd v. The Queen*, 2 B. & Smith, 656 ; Ord. lxviii. r. 2.

it has been provided, by the 32 Geo. III. c. 58, that the defendant may state, by way of defence to an information in the nature of a *quo warranto* in respect of any office in a town corporate, (whether exhibited by leave of the court, or by the attorney-general on behalf of the crown,) that he first took upon himself such office, six years or more before the information was exhibited ; and such defence may be pleaded with any other that the court may allow ; and may be met by a reply, that a forfeiture of such office had happened within such period of limitation ; and the title of the defendant, derived under any election, is not to be affected by defect of title in the person electing,—providing the elector has been in the exercise *de facto* of his office six years previous to the information. And, by the statutes 7 Will. IV. & 1 Vict. c. 78, 6 & 7 Vict. c. 89, and 45 & 46 Vict. c. 50, it has been provided, as regards municipal corporations, that every application for the purpose of calling upon a person to show by what warrant he claims to exercise the office of mayor, alderman, or burgess, in any borough within the Municipal Corporations Act, must be made before the end of twelve months after the election of the defendant, or the time when he shall become disqualified ; and that no election of a mayor shall be liable to be questioned, by reason of a defect in his title to the office of alderman or councillor to which he may have been previously elected, unless, within twelve months after his election, a rule shall have been applied for, calling upon him to show cause by what warrant he claimed to exercise such office ; and that every election to the office of mayor, alderman, councillor, or other corporate office, within any such borough, which shall not have been called in question within twelve months after such election, shall be deemed good and valid.

(6.) THE WRIT OF HABEAS CORPUS.—This is the most celebrated writ in the English law, being the great

prerogative remedy which the law has provided against violations of the right of personal liberty ; and though we have had occasion, in other parts of this work, to make some remarks upon *habeas corpus*,—still, a more particular detail of its history, and of the practice connected with it, may here be acceptable (*x*).

The most important kind of *habeas corpus* (and the only one to which the attention of the reader is here specially invited) is that of *habeas corpus ad subjiciendum*,—being the remedy used for the deliverance from illegal confinement (*y*). The writ is directed to any person who detains

(*x*) Blackstone notices (vol. iii. p. 128) three other writs (all of them now obsolete), for removing the injury of false imprisonment :—1st, The writ of *mainprize* (*manuceptio*), commanding the sheriff to take sureties (usually called *mainpernors*), for the appearance of the prisoner and to set him at large ; 2nd, The writ *de odio et atia*, commanding the sheriff to inquire, whether a prisoner charged with murder was committed on general cause of suspicion, or merely *propter odium et atiam*, for hatred and ill-will,—with the view (if the latter was found to be the case) of afterwards issuing another writ to admit him to bail ; and 3rdly, The writ *de homine replegiando*, commanding the sheriff to replevy a man out of custody in the same manner that chattels taken in distress may be replevied, upon security given that the prisoner shall answer any charge against him.

(*y*) The other kinds of the writ of *habeas corpus* mentioned in the

books, are:—1. The *habeas corpus ad respondendum*, to bring up a prisoner confined by the process of an inferior court, to charge him with a fresh action in the court above ; 2. *Ad satisfaciendum*, with a similar object when judgment in the inferior court has been had against the prisoner ; 3. *Ad faciendum et recipiendum* (otherwise called a *habeas corpus cum causâ*),—when, in an action in the inferior court, the defendant has been arrested,—to remove the proceedings and bring up the body of the defendant to the court above, to “do and receive what the king’s court shall deliver in that behalf” ; and 4. *Ad prosequendum, testificandum, deliberandum, &c.*, when a prisoner has to be brought up to bear testimony in any court, or to be tried in the proper jurisdiction. But with regard to the last, the occasions for its use have been diminished by 16 & 17 Vict. c. 30, s. 9, and 19 & 20 Vict. c. 108, s. 31, allowing prisoners to be brought up as witnesses, without a *habeas*,

another in custody ; and commands him to produce the body, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*,—to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider right in that behalf (*z*). This is a high prerogative writ, which existed at common law, though it has been improved, as we shall presently see, by statute (*a*) ; and it runs generally into all parts of the dominions of the crown, wherever situate ; but it has been provided, by 25 & 26 Vict. c. 20, that no writ of *habeas corpus* shall issue out of England, by authority of any judge or court therein, into any colony or foreign dominion of the crown, wherein her Majesty has a lawfully established court with authority to grant and issue such writ, and with power to ensure its due execution throughout such colony or dominion (*b*). The writ will only issue on application made, supported by affidavit of the facts, and after a rule or order made thereon (*c*) ; [for, as was argued by Lord Chief Justice Vaughan, “it is granted on motion, because it cannot be had of course ; and therefore there is no necessity to grant it, for the court ought to be satisfied that the party hath a probable cause to be delivered” (*d*). And this seems the more reasonable ; because, when once granted, the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the

by order of the judge or of a secretary of state ; and by 30 & 31 Vict. c. 35, s. 10, making an analogous provision with regard to the removal of prisoners from gaol in order to take their trial.

(*z*) State Trials, viii. 142 ; *R. v. Batcheldor*, 1 Per. & D. 516 ; S. C. nom. *Leonard Watson's Case*, 9 Ad. & El. 731 ; *In re Parker*, 5 Mee. & W. 32 ; *Carus Wilson's Case*, 7 Q. B. 984 ; *The Queen v.*

Brenan, 16 L. J. Q. B. 289 ; *In re Dunn*, 17 L. J. Q. B. 97 ; *Re Andrews*, 4 C. B. 226.

(*a*) Bl. Com. vol. iii. p. 137.

(*b*) *John Anderson's Case*, Jurist, vol. vii. pt. i. 122 ; *Ex parte Brown*, 2 Best & S. 280.

(*c*) *Hobhouse's Case*, 3 B. & Ald. 420.

(*d*) *Bushel's Case*, 2 Jon. 13.

[prisoner (*e*) ;] so that if it issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor, a felon, or a dangerous lunatic might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court : [and, indeed, Sir Edward Coke, when chief justice, did not scruple, in the thirteenth year of James the First, to deny a *habeas corpus* to one confined by the Court of Admiralty for piracy, there appearing, upon his own showing, sufficient grounds to confine him (*f*). On the other hand, if a probable ground be shown, that the party is imprisoned without just cause and therefore hath a right to be delivered, the writ is then a matter of right,—which may not be denied, but must be granted to every man that is committed, or detained in prison or otherwise restrained, though it be by command of the king, or of his privy council, or any other (*g*),—all which must, of course, be taken as being subject to any statutory provision, under which (as under the 54 & 55 Vict. c. 3) a discretion is vested in the court or judge before whom the application is made (*h*).

In a former part of these Commentaries, we expatiated at large on the personal liberty of the subject ; and it was then shown, that this right of personal liberty is a natural inherent right ; which cannot be surrendered or forfeited (unless for the commission of some crime) ; and which cannot be abridged (without the special permission of the law),—a doctrine coeval with the first rudiments of the English constitution, handed down to us from our Saxon ancestors, asserted after the Conquest, and confirmed by the Conqueror himself and his descendants,—and though

(*e*) *Bourn's Case*, Cro. Jac. 543.

(*f*) *R. v. Marsh*, 3 Bulstr. 27 ;

White v. Wiltshire, 2 Roll. Rep.

138.

(*g*) 2 Inst. 615 ; Com. Journ.

1 Apr. 1628.

(*h*) *Vide supra*, vol. ii. p. 278.

[sometimes a little impaired by the occasional despotism of princes, yet established on the firmest basis by the provisions of *Magna Charta*, and a long succession of statutes enacted under Edward the Third. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of political society, and in the end would destroy civil liberty; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful; and it is this consideration which induces the absolute necessity of expressing, upon every commitment, the reason for which it is made,—in order that the court, upon a *habeas corpus*, may examine into its validity, and (according to the circumstances of the case) may discharge, admit to bail, or remand the prisoner.

And yet the court of king's bench, early in the reign of Charles the First, relying on some arbitrary precedents (and those, perhaps, misunderstood), determined that they could not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in a case where he was committed by the special command of the king, or by the lords of the privy council (*i*). This drew on a parliamentary inquiry, and produced the *Petition of Right*, in the third year of Charles the First, which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council in pursuance of his Majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two Terms (including also the long vacation) to deliver any opinion,

(i) State Trials, vii. 136.

[how far such a charge was bailable ; and they eventually annexed to the grant of bail the condition of finding sureties for good behaviour.

The difficulties thus allowed to impede the application of the writ, gave rise to the statute 16 Car. I. c. 10, s. 8 ; whereby it was enacted, that if any person was committed, though by the king himself in person, or by the privy council, or by any of the members thereof, he should have granted unto him, without any delay under any pretence whatsoever, a writ of *habeas corpus*,—upon demand or motion made to the king's bench or common pleas : who should thereupon, within three court days after the return was made, examine and determine the legality of such commitment, and do what to justice should appertain, in delivering, bailing, or remanding the prisoner. Yet still, in the case of Jenks, who in 1676 was committed by the king in council for a turbulent speech at the Guildhall, new impediments were permitted to delay the release of the prisoner (*k*),—the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum*, &c., whereby the prisoner was discharged at the Old Bailey (*l*). Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy ; for the party imprisoning was at liberty to delay his obedience to the first writ ; and might wait till a second and a third writ, called an *alias* and a *pluries*, were issued, before he produced the party ; and many other vexatious shifts were practised, in order to detain state prisoners in custody ; which abuses at length gave birth to the famous *Habeas Corpus* Act, 31 Car. II. c. 2, which is frequently considered as another *Magna Charta* of the kingdom.]

(*k*) State Trials, vii. 471.

(*l*) *Crowley's Case*, 2 Swanst. 1.

The statute enacts, 1. That, on complaint and request in writing by or on behalf of any person committed and charged with any *crime*, (unless for treason or felony expressed in the warrant; or unless it appear, that he is charged as accessory before the fact to some felony, or upon suspicion thereof, or with suspicion of felony, which felony is plainly expressed in the warrant; or unless he is in prison on process in any civil cause),—the lord chancellor or any of the judges in vacation, [upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two Terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and, upon the return made, shall discharge the party, if bailable, upon his giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writs shall be endorsed, as granted in pursuance of the Act, and signed by the person awarding them. 3. That the writ shall be returned, and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days. 4. That any officer or keeper, neglecting to make due return, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one officer to another, without sufficient reason or authority, (as specified in the Act,) shall for the first offence forfeit 100*l.*, and for the second offence 200*l.*, to the party grieved, and be disabled to hold his office (*m*). 5. That no person, once delivered by *habeas corpus*, shall be recommitted for the same offence,

(*m*) A person, sent over from Ireland under a warrant from the secretary of state for Ireland, charged with any offence, and committed to prison until he can

be brought before a judge, is in general entitled to a copy of the warrant, under the *Habeas Corpus* Act, after it has been demanded. (*Sedley v. Arbouin*, 3 Esp. 174.

[under a penalty of 500*l.* 6. That every person committed for treason or felony, shall, if he requires it, in open court upon the first week of the Term, or the first day of the session of *oyer* and *terminer* and general gaol delivery, be indicted in that same Term or session, or else admitted to bail,—unless, indeed, the witnesses for the crown cannot be produced at that time ; and that if acquitted, or if not indicted and tried in the Term or session next following, he shall be discharged from his imprisonment for such imputed offence ; but that no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended, but shall be left to the justice of the judges of assize. 7. That if the lord chancellor or a judge shall deny the writ, on sight of a copy of the warrant of commitment, or upon oath made that such copy is refused, he shall forfeit to the party grieved the sum of 500*l.* And, 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places ; and into the islands of Jersey and Guernsey (*n*).]

Such is the substance of this great and important statute, which extended (we may observe) only to the case of such commitments as can produce no inconvenience to public justice by a temporary enlargement of the prisoner, all other cases of unjust imprisonment being left, by that statute, to the remedy by *habeas corpus* as it existed at common law (*o*). But, at a later period, in order to render the common law writ more effectual in cases not within the operation of the Act of Charles the Second, it was provided

(*n*) *Carus Wilson's Case*, 7 Q. B. 984 ; *The Queen v. Brenan*, 16 L. J. Q. B. 289.

(*o*) “ Even upon writs of *habeas corpus* at the common law, it is now expected by the court, agreeable to antient precedents

“ and the spirit of the Act of
 “ Parliament, that the writ should
 “ be *immediately* obeyed, without
 “ waiting for any *alias* or *pluries* ;
 “ otherwise an attachment will
 “ issue.” (3 Bl. Com. p. 137 ; *R. v. Cowle*, 2 Burr. 586.)

by 56 Geo. III. c. 100 :—1. That where any person shall be restrained of his liberty, (other than for some criminal or supposed criminal matter, and except persons imprisoned for debt, or by process in any civil suit,) any one of the judges may, upon *affidavit* showing a probable and reasonable ground for complaint, award the writ in time of vacation directed to the person in whose custody the party is confined,—the writ being made returnable immediately before himself, or any other judge. 2. That upon disobedience to the writ, the judge before whom it is returnable may issue a warrant to arrest the disobedient party, or party guilty in contempt. 3. That if the writ shall be awarded so late in vacation that it cannot be conveniently obeyed during vacation, the same may be made returnable in court on a certain day in the next Term (or, now, Sittings). 4. That if such writ shall be awarded so late that it cannot be conveniently obeyed during the Term, the same may be made returnable in the then next vacation before any of the judges. 5. That though the return to the writ may be good in law, it shall be lawful for the judge before whom it is returnable, to proceed to examine into the truth of the facts ; and if it appears doubtful to him whether they be true or not, it shall be lawful for him to let to bail the person so confined, upon his entering into a recognizance to appear in court in the Term (or Sittings) following, and the court may then proceed to examine into the truth of the facts in a summary way by *affidavit*, and may order and determine as to the discharge, bailing, or remanding of the party. 6. That the like proceeding for controverting the truth of the return may be had in the case where the writ shall be awarded by the court itself, or be returnable therein. 7. That the several provisions aforesaid shall extend to all writs of *habeas corpus* awarded in pursuance of the Act of the thirty-first year of Charles the Second. And, 8. That a *habeas corpus*, issued under the Act of 56 Geo. III.

c. 100, may run into any county palatine, or cinque port, or other privileged place ; or into the islands of Jersey, Guernsey, and Man ; or into any port, harbour, road, creek, or bay, upon the coast of England or Wales, lying out of the body of any county (*p*).

[By which admirable regulations, the remedy seems now to be complete for removing the injury of illegal confinement,—a remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention, of government ; for it frequently happens in foreign countries, (and has happened in England during the temporary suspension of the statute,) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten (*q*).]

(7.) THE WRIT OF CERTIORARI.—This writ issues from the High Court of Justice to the judge or officers of any inferior court of record, commanding them to return the proceedings in an action or matter therein depending, to the end that the applicant may have the more sure and speedy justice (*r*). This writ may be had not only in *civil* but also in *criminal* cases ; but the consideration of the writ of *certiorari* in its relation to criminal cases belongs more properly to the next Book of these Commentaries, where it will, accordingly, be found noticed (*s*) : and our attention is at present called to the writ in its relation to civil cases only. And here, its object is to obtain relief from some inconvenience supposed, in the particular case, to arise from a cause being disposed of before an inferior jurisdiction, *less capable than the High Court of rendering*

(*p*) Crown Office Rules (1886),
rr. 235 to 249.

(*q*) 3 Bl. Com. p. 138.

(*r*) Bac. Abr. Certiorari A ; *Ex parte Phillips*, 2 Ad. & El. 586.

(*s*) *Vide, post*, vol. iv. bk. vi. chaps. x. and xv.

complete and effectual justice. The writ may be denied by statute (providing some simpler remedy) in particular cases ; but where not so excluded, it may, in any civil proceeding, be applied for on a variety of grounds,—such, for example, as that difficult questions of law are likely to arise on the trial of the cause (*t*),—and this is the most usual ground, as regards all civil proceedings ; or (where the action is to be tried before a jury) that no impartial jury can be obtained in the inferior court (*u*).

The writ will issue in (among other cases) the following, that is to say :—(1) To remove into the High Court, from the quarter sessions, the proceedings instituted before the justices for the removal of a settled pauper ; and the High Court will then either affirm or quash the removal order, according to the law applicable to the case upon the facts given in evidence at the sessions ; and (2) To remove into the High Court a *replevin* action commenced in the county court,—and the ground for the *certiorari* in such latter case is, either that difficult questions of law are involved, or (sometimes) that a question of title is involved which it is beyond the jurisdiction of the county court to entertain. However, the writ will not issue as a matter of course ; and with regard to proceedings in the *county courts*, it has been provided, by 51 & 52 Vict. c. 43, s. 126, re-enacting the like provisions contained in the repealed statutes 9 & 10 Vict. c. 95, s. 90, and 19 & 20 Vict. c. 108, s. 38, that the writ of *certiorari*, removing proceedings therefrom, shall only issue if the High Court or a judge thereof shall deem it desirable that the cause shall be tried in the superior court ; and the applicant must give such security, for the amount of the claim and the costs of the trial, not exceeding in all 100*l.*, and shall assent to

(*t*) *Hunt v. Great Northern Railway Company*, 2 L. M. & P. 268.
 (*u*) *Symonds v. Dimsdale*, 2 Exch. 523.

such further terms, if any, as it shall be thought fit to impose (*x*).

And generally, with regard to the writ of *certiorari* to inferior courts, there are divers statutes which restrain the removal of frivolous cases for the purpose of vexatious delay ; *e.g.*, by 21 Jac. I. c. 23, it was enacted, that where the judge of an inferior court of record was a barrister of three years' standing, no cause (except as therein excepted) should be removed thence by any writ after issue joined ; and by 19 Geo. III. c. 70, s. 6 (as extended by 7 & 8 Geo. IV. c. 71, s. 6), no cause under the value of 20*l.* could be removed, unless the defendant gave security for payment of the debt and costs ; and the schedule annexed to the Borough and Local Courts of Record Act, 1872 (which schedule may be applied by order in council to any local court of record), contains an express provision, that no action shall be removed thence before judgment, except by leave of a judge, and on such terms as he shall think fit (*y*).

(*x*) The repealed Acts specified
the limit of 5*l.* for the claim, and
the limit of 100*l.* for the security.

(*y*) 35 & 36 Vict. c. 86, sched.
r. 12.

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